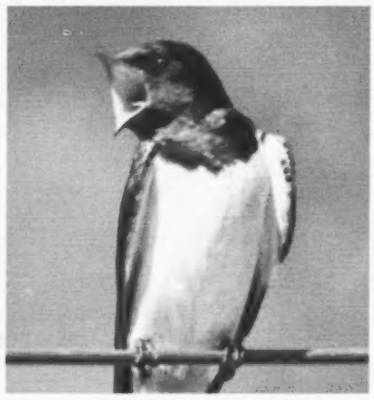
LAYING SIEGE TO THE LAST LINE OF DEFENCE

A Review of Ontario's Weakened Protections for Species at Risk



A Special Report to the Legislative Assembly of Ontario | November 2013

Environmental Commissioner of Ontario

So when I invite you to join me in zooming back a little for a broader perspective on wildlife conservation I do so in full awareness of the bias that shapes and directs my own reflections. Nevertheless, I think that I should make the effort. And if I can, you can. When you do, I am certain that you will come to the same conclusion: in the broadest sense, wildlife preservation is a catastrophic, heart-breaking disaster.

John A. Livingston, The Fallacy of Wildlife Conservation

The information contained in this Special Report should not be considered legal advice. This document is not a substitute for the *Environmental Bill of Rights, 1993* (*EBR*) or the *Endangered Species Act, 2007* (*ESA*) or any of their respective regulations. In the event of any inconsistency between this content and the *EBR*, the *ESA* or their regulations, the *EBR*, the *ESA* or their regulations (as the case may be) prevail. You can access the full text of the *EBR*, the *ESA* and their regulations on the Government of Ontario's "e-Laws" website at www.e-laws.gov.on.ca.

Environmental Commissioner of Ontario

Commissaire à l'environnement de l'Ontario

Gord Miller, B.Sc., M.Sc.
Commissioner

Gord Miller, B.Sc., M.Sc.
Commissaire

November 2013

The Honourable Dave Levac
Speaker of the Legislative Assembly of Ontario

Room 180, Legislative Building
Legislative Assembly
Province of Ontario
Queen's Park

Dear Mr. Speaker,

In accordance with section 58(4) of the *Environmental Bill of Rights, 1993*, I present the attached Special Report of the Environmental Commissioner of Ontario for your submission to the Legislative Assembly of Ontario.

This Special Report concerns the *Endangered Species Act, 2007*, which is the cornerstone of Ontario's efforts to conserve at-risk species. I am releasing this report to provide the Members of Provincial Parliament and the public with my assessment of the implementation of the Act to date and the implications of recent regulatory amendments. I hope that this Special Report will help to provide a foundation for improving measures to protect and recover Ontario's imperiled species.

Sincerely,

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Environmental Commissioner of Ontario

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EXECUTIVE SUMMARY

On June 30, 2008, Ontario's new *Endangered Species Act, 2007* (*ESA*) came into force, replacing legislation from 1971 that was outdated and ineffective. The new *ESA* offered protection to an increased number of species and their habitats, as well as provided greater flexibility for implementation. In 2009, the Environmental Commissioner of Ontario (ECO) released a Special Report entitled The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk. The ECO was supportive of the provincial government's new legislative framework for protecting species at risk, but raised numerous concerns surrounding the implementation of the *ESA*, especially the potential for misuse of the new Act's flexibility.

Over the past five years, the Ministry of Natural Resources (MNR) has struggled to fully implement the *ESA*. In particular, MNR has delayed implementation of several of the Act's key measures. Rather than meet statutory deadlines, MNR has relied excessively on its discretionary power to delay the preparation of nearly half of all required recovery strategies for species at risk. This in turn has caused downstream delays of government response statements and habitat regulations for individual species. In addition, MNR has struggled to develop an efficient approvals process for issuing permits under the *ESA* in a timely manner, due in part to a lack of sufficient policy direction.

On July 1, 2013, a series of regulatory amendments came into force that created broad exemptions from the Act's requirements to obtain government permission prior to harming a species at risk and/or its habitat. The importance of these regulatory changes has prompted the ECO to present this Special Report to the Legislative Assembly pursuant to subsection 58(4) of the *Environmental Bill of Rights, 1993*.

The *ESA* prohibits the killing or harming of an endangered or threatened species or damaging its habitat. Until recently, any person who wished to engage in one of these prohibited activities required an approval from MNR. Most commercial and industrial activities required an activity-specific permit from MNR, which obligated the proponent to take steps to achieve

an "overall benefit" for affected species at risk; other activities were permitted subject to entering into a project-specific agreement with MNR.

The July 2013 regulatory amendments, however, exempt proponents of a broad range of activities from the requirement to obtain a permit or agreement before contravening the *ESA*'s prohibitions. MNR is now relying on a "rules-in-regulation" system (sometimes also called a "permit-by-rule" system). The scope of the new exemptions includes:

- forestry operations;
- hydro-electric generating stations;
- aggregate pits and quarries;
- ditch and drainage activities;
- early exploration mining;
- wind facilities;
- development and infrastructure projects, including projects approved under individual and class environmental assessments (transitional only);
- certain activities affecting butternut trees, chimney swift, bobolink, eastern meadowlark, barn swallow and specified aquatic species;
- certain activities related to human health and safety;
- damage or destruction of "safe harbour" habitat; and
- activities geared towards species protection and recovery, and ecosystem conservation.

Collectively, these exemptions encompass many of the major activities that are known to negatively impact species at risk and their habitats. Now, proponents of these activities are only required to follow the rules in regulation, rather than obtain an individual permit. Further, in many cases, proponents will only need to take prescribed steps to "minimize" the "adverse effects" of their activities, rather than provide an "overall benefit" to the affected species. The transition exemption for development and infrastructure activities, while only temporary, decreases species protection by extending the period of time that species are without general habitat protection from a broad range of activities.

Without individual approvals, MNR has removed its own power to say "no" to projects, regardless of the potential importance of the affected area or the possibility of unacceptable cumulative effects on a species at risk or its habitat. Additionally, although the new exemptions require proponents to prepare documentation on the measures employed to minimize adverse effects on species, and in many cases, document the effectiveness of these measures, there is generally no obligation for proponents to submit this information to MNR. This problem is compounded by the ambiguity of the new rules, which muddy the clarity of the Act and render its prohibitions functionally unenforceable.

The prohibitions on harming and harassing species at risk and damaging or destroying their habitat form the backbone of the *ESA*; the sweeping nature of the new exemptions from those prohibitions has removed the key safeguards in the Act and significantly weakened the protection

and recovery of species at risk. These changes follow a disturbing trend of MNR using the *ESA*'s flexibility provisions to permit broad, open-ended extensions on the development of recovery strategies. Together, these actions indicate a ministry comfortable using flexibility measures not only in exceptional circumstances, but as a matter of regular practice.

The *ESA* is a progressive piece of legislation with the potential to protect and recover Ontario's species at risk. However, its success ultimately relies on effective, consistent and transparent implementation in line with the intent and purpose of the Act. The ECO believes that MNR's new approach to protecting species at risk is inconsistent with the Ontario Legislature's drafting of the *ESA*. The ECO is concerned that the ministry's implementation of the *ESA* to date has undermined the protection and recovery of Ontario's species at risk, tasks which the ministry has been mandated by the Ontario Legislature to achieve. The ministry has failed on all fronts, but most significantly it has failed the one group that cannot advocate on its own behalf: the most vulnerable species in Ontario.

SECTION 1

INTRODUCTION

Species around the world are facing an unprecedented threat of extinction from a variety of stressors. Habitat loss has been identified as the single greatest threat to species at risk, coupled with pollution, over-exploitation, disease, invasive species and climate change.[1] Nearly one quarter of the world's mammals, one-third of the world's amphibian species and one in eight birds are considered globally threatened or extinct.[2] In Ontario, 215 species or species populations are listed under the *Endangered Species Act, 2007* (*ESA*) as endangered, threatened, special concern or extirpated, and the province has many more imperiled species that have not had the benefit of being assessed and listed under the Act.[3]

> With these new exemptions, MNR is excessively exploiting the flexibility tools within the *ESA*, and nullifying much of the promise held by the new Act.

This dramatic decline in biodiversity not only threatens the functioning of the ecosystems that we depend on for our air, water and food, but it also reduces the resilience of these ecosystems to environmental change. Protecting at-risk species is not just a matter of conserving biodiversity, it is also about preserving the important personal connections that Ontarians have to our natural heritage, including the snapping turtles, monarch butterflies, bald eagles and woodland caribou that are part of our collective ecological community. The challenges we face in protecting and recovering species at risk are not insurmountable, but immediate, effective and sustained action is required.

This year marks the 42nd anniversary of species at risk protection in Ontario. In 1971, Ontario became one of the first jurisdictions in the world to legally protect species at risk when it

enacted the *Endangered Species Act* – a ground-breaking and ambitious law for its time. Although the Act eventually became outdated and ineffective, it saw a number of successes. For example, in 2006, the 'at-risk' status of the peregrine falcon and bald eagle improved, both of which were protected under the 1971 Act.[4]

> The success of the *ESA* ultimately relies on effective, consistent and transparent implementation in line with the intent and purpose of the Act.

The provincial government seemed poised to continue its leadership in protecting species at risk with the introduction of the revamped *ESA* in 2007. The new *ESA* offered a compromise, providing protection to an increased number of species and their habitats and giving independent experts the responsibility for determining which species warrant legal protection, while at the same time allowing for greater flexibility in implementation.

In 2009, the Environmental Commissioner of Ontario (ECO) released a special report entitled The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk. The ECO was supportive of the provincial government's new legislative framework for protecting species at risk, but raised numerous concerns surrounding the implementation of the *ESA*, especially with regard to the potential misuse of the new Act's flexibility tools, including the discretion to create exemptions by regulation. The 2009 Special Report warned:

> The ECO has significant concerns about the dangerous potential for abuse of the government's power to create exemptions by regulation. The overall effectiveness of the new legislation could be seriously undermined if the government does not exercise significant restraint and caution in using its discretion to exempt harmful activities.[5]

Unfortunately, it appears these misgivings were well-deserved.

Five years after the introduction of the *ESA*, in 2013, the Ministry of Natural Resources (MNR) was seriously struggling with implementing the Act. Then on July 1, 2013, the province brought into force a series of regulatory amendments that created a number of significant exemptions to the Act's requirements to obtain government authorization (i.e., a permit or agreement) prior to harming species at risk and/or their habitats. With these new exemptions, MNR is excessively exploiting the flexibility tools within the *ESA*, and nullifying much of the promise held by the new Act. The ministry received 10,034 comments in response to its proposal on the Environmental Registry to make these amendments, demonstrating the public's overwhelming concern for Ontario's species at risk and the intended government direction.[6]

The importance of these regulatory changes has prompted the ECO to present this Special Report to the Legislative Assembly pursuant to subsection 58(4) of the *Environmental Bill of*

Rights, 1993. This Special Report is a companion to The Last Line of Defence. It includes an overview of the implementation of the *ESA* to date, an explanation of the new exemptions created under the Act, and an analysis of the implications of MNR's new approach to regulating species at risk.

The *ESA* is a progressive piece of legislation with the potential to protect Ontario's species at risk. However, its success ultimately relies on effective, consistent and transparent implementation in line with the intent and purpose of the Act. The ECO believes that MNR's new approach to protecting species at risk is inconsistent with the Ontario Legislature's intentions when it passed the *ESA*. The ECO is concerned that MNR's current approach to implementing the *ESA* will seriously undermine its ability to protect and recover Ontario's species at risk, tasks which the ministry has been mandated by the Ontario Legislature to achieve.

SECTION 2

OVERVIEW OF THE ACT

The *ESA* has three stated purposes: (1) to identify species at risk; (2) to protect species at risk and their habitats, and to promote their recovery; and (3) to promote stewardship activities to assist in the protection and recovery of species at risk.

2.1 Designation of Species at Risk

The first step towards achieving the Act's goals occurs when a species is assessed by an independent scientific body, the Committee on the Status of Species at Risk in Ontario (COSSARO), and is determined to fall into one of five at-risk categories.[7] If a COSSARO report categorizes a species as special concern, threatened, endangered or extirpated, MNR then has three months to amend the Species at Risk in Ontario (SARO) regulation (O. Reg. 230/08) to reflect the species' new 'at-risk' designation. Once a species is included on the SARO list, the Act provides specific protections to that species and its habitat, and requires the government to take certain steps to promote the species' recovery (see Figure 1).

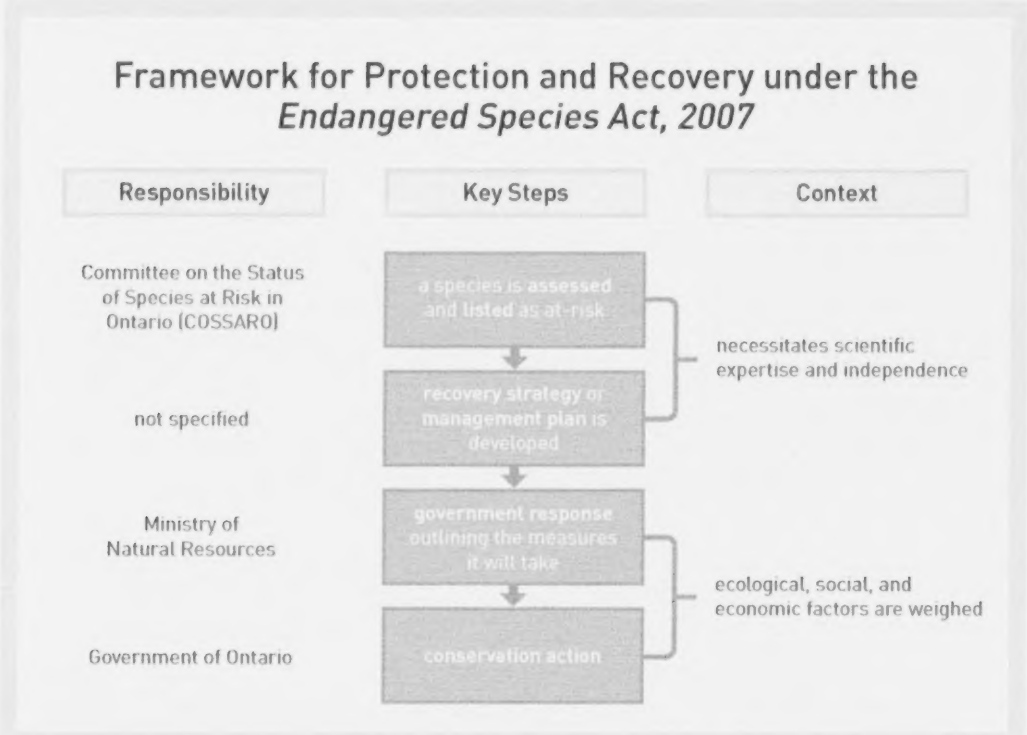
Framework for Protection and Recovery under the Endangered Species Act, 2007
Responsibility
Key Steps
Context
Committee on the Status of Species at Risk in Ontario (COSSARO)
a species is assessed and listed as at-risk
not specified
recovery strategy or management plan is developed
necessitates scientific expertise and independence
Ministry of Natural Resources
government response outlining the measures it will take
Government of Ontario
conservation action
ecological, social, and economic factors are weighed

FIGURE 1 | This figure illustrates the general framework of the *Endangered Species Act, 2007*. The listing of species at risk and the development of plans to protect them are intended to be an impartial and science-based process. The government must then detail the steps it will take to conserve the species.

2.2 Recovery Strategies and Response Statements

Once a species is listed under the *ESA*, a recovery strategy (for endangered and threatened species) or management plan (for some special concern species[8]) is required. MNR is responsible for ensuring that these strategies and plans are prepared, although they are considered advice to government. Specific time limits are set out in the Act for the preparation of these documents; however, delays are permitted in certain circumstances (see Section 3.1 of this Special Report). After a provincial recovery strategy or management plan is completed, MNR is required to provide a government response statement, which summarizes the actions the Ontario government intends to take to protect and recover the species.[9] The ministry must ensure that the actions identified in a response statement are implemented, provided that they are "feasible." The feasibility of these actions is determined by the Minister of Natural Resources, who may take social and economic factors into consideration.

2.3 Prohibitions and Protections

Section 9 of the *ESA* sets out a series of prohibitions for species listed as extirpated, endangered or threatened, including:

- killing, harming, harassing, capturing or taking a living member of a species; and
- activities such as possessing, transporting, collecting, buying and selling species.

Section 10 of the Act also prohibits damaging or destroying the habitat of an endangered or threatened species (and extirpated species if prescribed by regulation). Habitat is defined as "an area on which the species depends, directly or indirectly, to carry on its life processes," or may also refer to a specific area defined by regulation. However, these general habitat protections under section 10 did not come into force immediately for species that were not previously protected under the old *Endangered Species Act*. In fact, species listed for the first time under the new law that came into force in June 2008 were not to receive habitat protection for five years (i.e., until June 2013), unless a habitat regulation was made for that specific species.

> There are conditions that must be met when the ministry is considering a proposal for a regulatory exemption that would apply to an endangered or threatened species.

This transition period logically necessitated that MNR develop sufficient policies to support the implementation and enforcement of the Act's general habitat protections before they would take effect in June 2013. Although the ministry developed a very generalized habitat policy (for further details see Section 2.4 of the ECO's 2011/2012 Annual Report, Part 2), MNR failed to develop adequate species-specific direction in time for this deadline. As a result, an unworkable situation was created that allowed the ministry to rationalize the sweeping exemptions from habitat protections discussed in the remainder of this report.

2.4 Permitting and Agreements

Under section 17 of the Act, the Minister may issue four types of permits that authorize a person to engage in an activity that would otherwise be prohibited:

- if the activity is necessary for the protection of human health or safety;
- if the purpose of the activity is to assist in the protection or recovery of a species;
- if the main purpose of the activity is not to assist in the protection or recovery of a species, but an overall benefit to the species will be achieved within a reasonable time through requirements imposed by conditions of the permit, and reasonable steps to minimize adverse effects on individual members of the species are required by conditions of the permit; or
- if the activity will result in a significant social or economic benefit to Ontario, but will not jeopardize the survival or recovery of the species in Ontario.

Subsections 18(1) and 18(2) of the *ESA* provide an alternative mechanism for carrying out otherwise prohibited activities. These subsections allow instruments issued under other federal or provincial legislation to have the same effect as an *ESA* permit provided that a number of conditions are satisfied. For activities that are not specifically intended to assist in the protection or recovery of a species, the Minister or other authorizing official must be of the opinion that an overall benefit to the species would be achieved within a reasonable time through requirements imposed by the instrument.

In certain circumstances, MNR may also authorize otherwise prohibited activities by means of an agreement with a proponent.[10]

As of June 2013, MNR had issued 560 permits and entered into 186 agreements since the introduction of the *ESA*.

2.5 Exemptions by Regulation

Subsection 55(1)(b) of the *ESA* allows the government to make regulations that create exemptions from the prohibitions imposed by sections 9 and 10 of the Act. However, there are conditions that must be met when the ministry is considering a proposal for a regulatory exemption that would apply to an endangered or threatened species.

First, the Minister must consider whether the regulation is likely to jeopardize the survival of the affected species in Ontario, or likely to have a significant adverse effect on the affected species. If the Minister is of the opinion that either of these results is likely, then the Minister is required to consult with an expert on the possible effects of the proposed regulation on the species. Under these circumstances, the regulation cannot be made unless a number of conditions are satisfied.[11]

SECTION 3

IMPLEMENTATION OF THE ACT TO DATE

Under the *ESA*, MNR is required to: maintain the SARO regulation in accordance with information provided by COSSARO; ensure the preparation of recovery strategies and management plans; and prepare government response statements and habitat regulations. For many of these tasks, the transition provisions of the *ESA* provided MNR with a five-year window, ending in June 2013, to ensure completion of the first round of materials for many species not protected under the previous legislation. Despite some progress, the ministry fell far short of ensuring delivery of all materials that were expected by June 30, 2013, making extensive use of its statutory power to delay the deadlines of response statements – a mechanism that was intended to be used only in rare, specified situations. Moreover, even where guidance documents have been developed, the content is so vague that the government has essentially failed to provide for meaningful species recovery action.

As of July 31, 2013, the SARO list includes 15 extirpated species, 99 endangered species, 56 threatened species and 45 species of special concern. For a summary of changes to the SARO list since 2008 and an overview of the *ESA* deadlines met and missed, please refer to Appendix A.

3.1 MNR Delays Half of All Recovery Strategies

In The Last Line of Defence, the ECO highlighted the importance of adhering to legislated timelines for recovery strategies and management plans and cautioned MNR to use its discretionary powers to extend the statutory deadlines for recovery strategies only in exceptional circumstances and with sufficient justification. It appears that MNR has not taken this approach; of the recovery strategies required for the 155 endangered and threatened species and species populations in Ontario, nearly half have been delayed, at times with questionable rationales. These delays occurred despite the deadline being known to MNR, in most cases, since the Act passed in June 2007.

The *ESA* allows MNR to extend recovery strategy timelines in limited circumstances; specifically, where the Minister is of the opinion that extra time is needed because of: the complexity of the issues involved; the desire to co-ordinate the strategy with another jurisdiction; or the desire to prioritize other species. In addition, the Minister must be of the opinion that the delay will not jeopardize the survival or recovery of the species and must post a notice on the Environmental Registry, prior to the original recovery strategy deadline, explaining the reason for delay and the new expected deadline. This power can be an important tool to avoid duplication of efforts and ensure strategic consistency between the federal and provincial governments; it also allows MNR to ensure that appropriate care and attention is provided to particularly complex cases. The usefulness of this mechanism, however, must be weighed against other consequences of delaying action and should only be applied sparingly.

Approximately half of delayed recovery strategies (for 35 species or species populations) have been postponed while the Ontario government awaits federal recovery strategies or management plans for species also listed under the federal *Species at Risk Act* (*SARA*).[12] For species awaiting a federal recovery strategy, however, current drafting rates by federal ministries suggest that, when coupled with the waiting periods already built into the *ESA*, some species may not have a provincial recovery strategy until 12 years after they were first listed as endangered or threatened under the *ESA*.[13]

Exacerbating this situation, there appears to be confusion about the federal status of some species, which may result in additional unnecessary delays. For example, three of the species for which MNR is waiting to co-ordinate with federal recovery strategies are not actually federally listed species at risk and therefore there are no forthcoming federal, *SARA*-mandated, species-specific recovery strategies; as such, it is unclear what information MNR expects to receive before completing the required provincial recovery strategies.[14] Further confusion arises from a May 2013 Environmental Registry notice stating that additional time was required to complete recovery strategies for 27 species or species populations because the ministry is awaiting *SARA* strategies;[15] despite this explanation, the federal management plan and recovery strategy for two of these species had already been finalized for over a year at the time the notice was posted.[16]

On May 31, 2013, MNR also advised that it was postponing the deadline for a further 35 recovery strategies in order to prioritize those of other species;[17] for most of the species affected by the delays, recovery strategies were originally due by June 30, 2013. MNR has estimated that the recovery strategies for the secondary priority species will be completed within the next three years. In other words, it will have taken approximately eight years from the date the species was added to the SARO list merely to gather scientific advice on how to protect and recover the species, let alone have the Ontario government articulate what steps it will take toward conservation and recovery.

> Despite six years of advance notice that there would be a wave of 2013 deadlines for dozens of species, MNR did not prepare itself to meet these deadlines.

MNR's assertion that it was delaying deadlines for some recovery strategies in order to prioritize others seems suspect. MNR did not indicate which recovery strategies it was prioritizing ahead of these delayed species; however, among the 72 species or species populations overdue for a recovery strategy as of July 1, 2013, only two were not waiting for a federal strategy or had not been given secondary priority.[18] Moreover, on July 15, 2013, MNR released seven draft recovery strategies – not for higher-priority species, but for species on the May 31, 2013 "secondary priority" list. Recovery strategies for no other, higher-priority, species were released ahead of these. It appears that after the government's failed attempt in 2012 to statutorily extend *ESA* prescribed deadlines under Bill 55 (see Text Box in Section 5 of this Special Report), MNR may have used its limited discretionary power to delay the deadlines for recovery strategies to simply provide the additional time it was denied through the legislative process. Despite six years of advance notice that there would be a wave of 2013 deadlines for dozens of species, MNR did not prepare itself to meet these deadlines.

MNR has invoked so many delays for so many species that the resulting years of inaction may permit significant damage to occur to species at risk. These deferrals may well undermine whatever benefit could theoretically arise from federal-provincial coordination years down the road, or any purported "prioritization" by MNR. Regardless of the Act's provisions allowing extended timelines, a multi-year delay before even commencing species recovery action does not serve the intent of the *ESA*, as it could lead to the further imperilment of Ontario's species at risk. Moreover, if it were the case that MNR was misapplying its discretionary power to delay in order to simply adjust deadlines to its own liking, such a practice would be tantamount to an outright disregard for the *ESA* as a law of Ontario.

3.2 Species Continue to Wait on Government Response Statements and Habitat Regulations

MNR has also been late in meeting its statutory deadlines for completing government response statements. For example, the government response statements due in September 2012 for lake sturgeon and polar bear have been indefinitely delayed. Unlike recovery strategies, the *ESA* does not provide a legal mechanism for the delay of government response statements. For further discussion of these absent government response statements, see Parts 4.3 and 4.4 of our 2012/2013 Annual Report.

Similarly, MNR routinely delays the development of species-specific habitat regulations until a recovery strategy is complete, thus magnifying the impact of rampant recovery strategy delays. Habitat regulations provide clarity to MNR, the public and proponents about

areas that are critical to species at risk. Although there is an inherent sensibility in waiting to prepare habitat regulations until recovery strategies are completed, this added delay may amplify the challenges associated with a lack of species-specific protection strategies, particularly given the uncertain timetable for completion. This prolonged absence of habitat regulations will certainly hinder MNR's ability to make appropriate decisions about permitting and *ESA* enforcement.

Given the delayed status of so many recovery strategies, these other setbacks quickly compound the situation. Furthermore, since the timetable for conducting a five-year review is tied to production of the response statement, any delay earlier in the process has a domino effect on processes scheduled years in the future. In the face of the sweeping recovery strategy delays discussed above, these additional setbacks are simply unacceptable.

3.3 Empty Response Statements

As the ECO reported in our 2010/2011 Annual Report, government response statements have proven to be little more than an "empty bureaucratic exercise," as they espouse only general and vague commitments that are difficult to track against practical progress such as specific timelines or numeric population recovery goals. These commitments are largely uniform reiterations of responsibilities already established under the *ESA*. The response statements focus heavily on mere population maintenance, with little attention to the recovery efforts intended to motivate the entire *ESA* process. They also place a heavy expectation on non-government parties to take on significant leadership roles, particularly in the area of species recovery, yet offer no detailed plan of action for ensuring such work is carried out. Since the ECO first reported on this issue, MNR has failed to address these and other concerns in its production of more recent response statements. Without this critical guidance, Ontario's species at risk have little chance of recovery. This inaction is all the more troubling in light of the significant delays in getting to the response statement stage of the recovery planning process. The ECO's criticisms and recommendation from our 2010/2011 Annual Report continue to stand, unaddressed by MNR.[19]

3.4 No Action on Special Concern Species

In the case of special concern species, the *ESA* excuses MNR from its obligation to prepare management plans where a species is also listed under *SARA*, thus requiring a federal

recovery strategy or management plan. It bears noting that although federal strategies and plans are outside Ontario's control, delays in their production also contribute to inaction on Ontario's species at risk. At the current average rate of production, it may take approximately a further 13 years before all currently listed special concern species have a management plan in place.[28] While the *ESA* clearly relieves the province from preparing management plans for federally listed species, it is inconsistent with the purposes of the Act to allow species at risk to wait almost 20 years from their date of listing before any official plan is in place. For these species, the provincial government has essentially absconded all responsibility to prevent further imperilment.

SECTION 4

OVERVIEW OF REGULATORY AMENDMENTS

4.1 MNR Transformation and Modernization of Approvals

One of the ways that Ontario's natural resources are regulated is through the issuance of approvals for natural resource-related activities. For example, these approvals can take the form of licences for resource extraction, licences for hunting, trapping and fishing or, in the case of the *ESA*, permits to engage in an activity that could harm an endangered or threatened species. MNR's approvals process has traditionally been paper-based and dependent on individual review of each permit by ministry staff.

In early 2013, as part of MNR's three-year Transformation Plan to modernize its business and operate on a more cost-efficient basis, the ministry began to roll out a program to streamline its approvals process. Under this program, MNR evaluates the many approvals it issues and, where deemed appropriate, changes approval types by either: (1) eliminating the approval altogether from regulatory control; (2) eliminating the approval but establishing rules in regulations for the activity (also known as a "permit-by-rule" system); or (3) issuing the approval using a registry system, in conjunction with rules in regulations. For further details of MNR's Transformation Plan refer to Part 2.1 of the ECO's 2012/2013 Annual Report.

As part of this modernization of approvals process, the Ontario government made extensive regulatory amendments under the *ESA* that exempt proponents of a broad range of activities from the requirement to obtain an approval to contravene the Act's prohibitions. Instead of obtaining an approval, those proponents are now generally only required to follow rules set out in a regulation (O. Reg. 242/08) and, in most cases, register the activity with MNR. The ministry claims that "the amended regulation will allow for more efficient implementation of the *ESA* while continuing to protect species at risk and their habitats."[21]

MNR's implicit justification for this shift to a rules-in-regulation approach for *ESA* permits was the purported high costs of permitting. An internal report produced in October 2011 estimated the ministry cost involved in the *ESA* permitting process. The report concluded that, on average, it took MNR staff about 500 hours over the course of four years to develop an *ESA* permit, costing almost $24,000.[22] However, this report only assessed 12 permits, and included perhaps one of the most complex approvals that MNR had ever issued (for improvements to Highway 69/400), suggesting that the calculated "average" may be severely inflated. Moreover, and more importantly, the ministry's high costs are a defect of its own making: by failing to develop clear and consistent policies to guide the permitting process, MNR created an inefficient and *ad hoc* approach to permitting that was unnecessarily lengthy, convoluted, costly and extremely frustrating for proponents and other stakeholders.

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Rather than remedy this fundamental defect and improve the existing approvals process, MNR chose to take the easier road and simply work around the constraints of the *ESA*. The ministry first attempted to create exemptions by amending the *ESA* through the budget bill tabled in March 2012 (see Box "Proposed Changes to the *ESA* in Bill 55" in Section 5 of this Special Report). However, there was strong public opposition to the proposed amendments and they were not approved as part of Bill 55. Ultimately, through the July 2013 regulatory amendments, MNR was able to replace many approvals with new exemptions.

4.2 New Exemptions under O. Reg. 242/08

Until recently, any person who wished to engage in a prohibited activity (i.e., harm or harass an endangered or threatened species, or damage or destroy its habitat) required a permit or agreement from MNR to do so.

The new regulatory exemptions now allow various types of commercial activities and industrial sectors to proceed without obtaining an approval. These include: forestry operations; hydro-electric generating stations; aggregate pits and quarries; ditch and drainage activities; early exploration mining; and wind facilities. In addition, a broad transition exemption has been created for certain development and infrastructure projects that will effectively delay the habitat protections for the transition species (i.e., those species whose habitat ostensibly became protected under the *ESA* on June 30, 2013) by an additional two years, and will delay the protection of newly listed species (i.e., species listed on January 24, 2013) and their habitats from these projects by up to seven years from the date the species were listed.[23]

MNR has also created a series of species-specific exemptions for certain activities affecting butternut trees, chimney swift, bobolink and eastern meadowlark, barn swallow and specified aquatic species. Other activities that qualify for the new exemptions include those geared towards species protection and recovery, ecosystem conservation and human health or safety. There is also a new exemption for the damage or destruction of "safe harbour" habitat (i.e., newly-created habitat for a particular at-risk species) in specified circumstances.

Finally, the amended regulation includes a series of administrative changes that transition pre-existing exemptions and activities previously covered by permit into the rules-in-regulation system. These include: possession and transport of species at risk for educational and scientific purposes; incidental catch of species at risk; and the commercial cultivation of vascular plants.

For details on each of the new exemptions please refer to Appendix B.

Collectively, these exemptions encompass many of the major activities that are known to adversely affect species at risk and their habitats. Most of these activities previously could have been allowed to operate under an activity-specific permit that required the proponent to take steps to achieve an overall benefit for affected species at risk, while other activities were permitted subject to entering into a project-specific agreement with MNR. In contrast, proponents of these activities will now only be required to follow the rules in regulation, and take prescribed steps to minimize the adverse effects (or negative impacts) of their activities.

Conditions of the new exemptions vary, but almost all require a proponent to register with MNR before commencing the exempted activity by submitting a "notice of activity" form to the ministry. There is currently no fee to register an activity, unlike the activity registry administered by the Ministry of the Environment. Almost all exemptions require proponents to take specific steps to minimize adverse effects on the species in question. Most, with a few notable exceptions, also require the proponent to prepare a mitigation plan that describes the steps taken during the activity to minimize adverse effects on the affected at-risk species, and to keep the plan updated. Many exemptions include a condition requiring the proponent to monitor and/or report on the effects of the activity on the species. The vast majority of exemptions do not require the mitigation plans, monitoring records or reports to be submitted to the ministry, although they must be provided upon request by MNR. Some exemptions also require proponents to report sightings of the at-risk species to the Natural Heritage Information Centre (NHIC). For details regarding the conditions applicable to each exemption, refer to Table 1 below and Appendix B.

Collectively, these exemptions encompass many of the major activities that are known to adversely affect species at risk and their habitats.

TABLE 1 | Summary of Exemption Conditions (refer to O. Reg. 242/08 for full legal text)

Exemption	Registration	Mitigation Plan	Steps to Minimize Adverse Effects	Monitoring	Record Keeping	Reporting	Actions to Benefit Species[24]	Report Species Observations to NHIC
Administrative Efficiencies								
Possession for science and education	Yes	No	No	No	Yes	No	No	No
Trapping incidental catch	Sometimes[25]	No	No	No	No	No	No	No
Commercial cultivation of vascular plants	No	No	Yes[26]	No	No	No	No	No
Species-Specific Exemptions								
Barn swallow	Yes	No[27]	Yes	Sometimes[28]	Sometimes[29]	No	Sometimes[30]	Yes
Bobolink and eastern meadowlark	Yes	No[31]	Yes	Yes	Yes	No	Yes	No
Butternut[32]	Yes	No	No	Yes	Yes	No	Yes	No
Chimney swift	Yes	No[33]	Yes	Sometimes[34]	Sometimes[35]	No	Sometimes[36]	Yes
Aquatic species	Yes	Yes	Yes	Yes	Yes	No	Yes[37]	Yes
Ecosystem Protection and Activities to Benefit Species at Risk								
Ecosystem protection	Yes	Yes	Yes	Yes	No	Within 180 days of completion	No	Yes
Species protection and recovery	Yes	Yes	Yes	Yes	Yes	Within 180 days of completion[38]	No	Yes
Safe harbour habitat	Yes	No	Yes	No	No	Within 90 days of completion	No	No
Exemptions for Industrial and Development Activities								
Development and infrastructure – newly listed and transition species	Yes	Yes	Yes	Yes	No	Annually	No	Yes
Threats to health or safety	Yes	Sometimes[39]	Yes	No	No	No	No	Yes
Forestry operations	No	No	No	No	No	Sometimes[40]	No	No
Hydro-electric generating stations	Yes	Yes	Yes	Yes	No	Annually	No	Yes
Aggregate pits and quarries	Yes	Yes	Yes	Yes	No	Annually	No	Yes
Drainage works	Yes	Yes	Yes	No	No	Annually	No	No
Early exploration mining	Yes	Yes	Yes	Yes	No	Within 180 days of completion[41]	No	Yes
Wind facilities	Yes	Yes[42]	Yes	Yes	No	Yes[43]	No	Yes

SECTION 5

UNDERMINING THE LEGISLATION

With the regulatory amendments that came into force in July 2013, MNR has been widely accused of undermining its own legislation. The prohibitions on harming and harassing species at risk and damaging or destroying their habitat form the backbone of the *ESA*. The sweeping nature of the newly created exemptions from those prohibitions significantly water down the practical value of the legislation to the detriment of at-risk species. In effect, the *ESA*'s prohibitions will no longer apply to a large number of activities that contributed to species becoming imperiled in the first place.

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The *ESA* already has built-in provisions to grant exceptions from the Act's prohibitions in appropriate circumstances, through the issuance of permits and agreements. This necessitates consideration of individual cases by MNR staff and, in theory, carefully weighing all relevant, site-specific factors before deciding whether to issue a permit – and then, if a permit is to be issued, identifying appropriate safeguards to impose as conditions of the exception. The recent regulatory amendments eliminate this process in many circumstances, and instead apply blanket exceptions – with less scrutiny and fewer safeguards than required under the Act – to such a broad range of activities that the exceptions will, in fact, become the norm. The ECO warned in our 2009 Special Report:

> While the limited use of exceptions may be warranted, they should not be used to undermine the greater purpose of the law: the protection and recovery of species at risk.[47]

Unfortunately, this is exactly what MNR has now done. The recent regulatory amendments follow an already disturbing trend of MNR overusing the flexibility provisions of the Act: as discussed in Section 3 of this Special Report, MNR has been broadly applying its discretion to extend deadlines to allow sweeping, open-ended extensions on the development of recovery strategies. Together, these actions indicate a ministry comfortable using the *ESA*'s flexibility measures not only in exceptional circumstances, but as a matter of course and regular practice.

5.1 Lowering the Standard of Protection

One of the most troubling aspects of the regulatory amendments, as set out below, is that they lower the standard of protection for endangered and threatened species from the exempted activities, inevitably increasing the ecological risk to the species.

This reduced standard of protection is ultimately not good for industry either. In the long-term, industries need to show their customers and the public that they are meeting tough, fair and up-to-date standards. Without high standards, there will inevitably be endless and expensive local battles (see for example, "Renewable Energy Approval Revoked because of Serious and Irreversible Harm to Blanding's Turtle" in Section 6 of this Special Report).

Loss of Overall Benefit

The *ESA* includes a number of safeguards intended to apply when the Minister is considering the issuance of a permit and agreement. One of the most common types of permits issued for industrial and commercial activities requires that an "overall benefit" to the species be achieved through requirements imposed by conditions of the permit. Briefly, such a permit requires not only that a proponent take steps to minimize the negative effects of the approved activity on the at-risk species, but that they also take steps to improve the overall state of the species (see Figure 2). According to MNR, "[o]verall benefit is more than no net loss or an exchange of like-for-like ... Overall benefit is grounded in the protection and recovery of the species at risk and must include **more** than steps to minimize adverse effects on the protected species or habitats" (emphasis in original).[43]

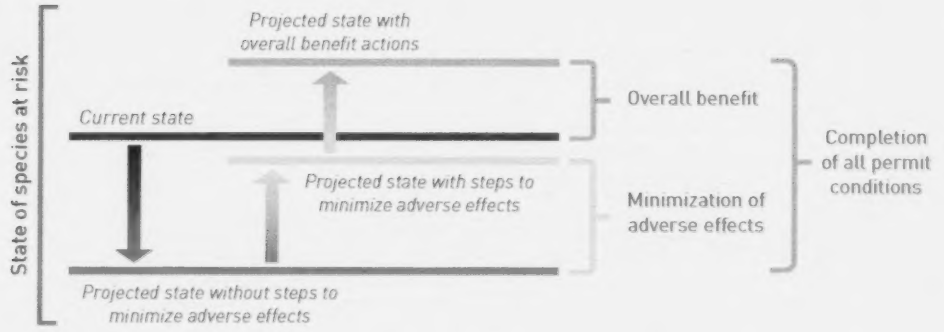

State of species at risk
Projected state with overall benefit actions
Current state
Projected state with steps to minimize adverse effects
Projected state without steps to minimize adverse effects
Overall benefit
Minimization of adverse effects
Completion of all permit conditions

FIGURE 2 | A simplified representation of overall benefit concept as depicted by MNR. (Source: MNR, Endangered Species Act Submission Standards for Activity Review and 17(2)(c) Overall Benefit Permits, February 2012).

The ECO warned in The Last Line of Defence:

> MNR should rigorously apply the Act's "overall benefit test" and the precautionary principle, including an assessment of cumulative impacts, when screening the appropriateness of authorizing activities that would otherwise be prohibited under the *Endangered Species Act, 2007*.[44]

Under the new regulatory exemptions from the *ESA*'s prohibitions, proponents of exempted activities that harm a species at risk or its habitat are not required to provide an overall benefit to the species. Most proponents are only required to minimize the adverse effects of their activities following prescribed methods – likely leaving the species in a worse state than before the activity was undertaken. While some of the species-specific exemptions require proponents to take actions that could potentially benefit the species (e.g., replacing damaged or destroyed habitat with a greater area of suitable new habitat), the vast majority of these exemptions do little to protect and recover species at risk beyond seeking to minimize predictable adverse effects.

Side-stepping Section 18 of the ESA

Section 18 of the *ESA* provides another potential mechanism to authorize activities that would otherwise be prohibited under the Act. If the activity in question requires an instrument under another piece of legislation, that instrument can act as a substitute for an *ESA* permit if certain conditions are met. For activities that are not intended to assist in the protection or recovery of the affected species, the Minister (or other authorizing official) must be of the opinion that an overall benefit to the affected species will be achieved.

MNR created a new exemption for forestry operations in O. Reg. 242/08 that accomplishes essentially what was contemplated under section 18, only without the same safeguards provided for in the *ESA*. Essentially, the regulatory exemption eliminates the need for a holder of a licence under the *Crown Forest Sustainability Act, 1994* to obtain a permit under the *ESA*, subject to some conditions (e.g., compliance with any operational prescriptions in the forest management plan that are applicable to the at-risk species in question). Unfortunately this exemption does not require the licence holder to satisfy the overall benefit test that would have applied under section 18 of the *ESA*. This direction is particularly troubling since MNR has for many years failed to monitor the impacts of forest management actions at the provincial scale through the Provincial Wildlife Population Monitoring Program (for further information refer to Section 2.6 of the ECO's 2011/2012 Annual Report, Part 2), and as a result, it has no reliable way of knowing whether its regulation of forestry activities is adequately protective of the province's species at risk.

Creating this exemption for forestry – without a requirement for overall benefit – appears to deliberately side-step the purpose of section 18 of the *ESA* and, by extension, the will of the Legislative Assembly of Ontario.

Overuse of Flexibility Tools Undermining Habitat Protection

One of the most lauded aspects of the *ESA* when it first came into force was its flexible approach to habitat protection, which relies on permits and agreements to allow for a mix of uses in protected habitats when appropriate. By contrast, the predecessor 1971 *Endangered Species Act* had employed a strict 'all or nothing' approach to protecting habitat that was considered excessively rigid, and ultimately led to the government's reluctance to protect new species under the legislation. The new flexibility in the 2007 *ESA* was expected to resolve many of the conflicts that had made the previous law arguably unworkable. However, the ECO warned in 2009 that the flexibility in the new law, if misapplied, could unravel the safety net that the Act provides for at-risk species:

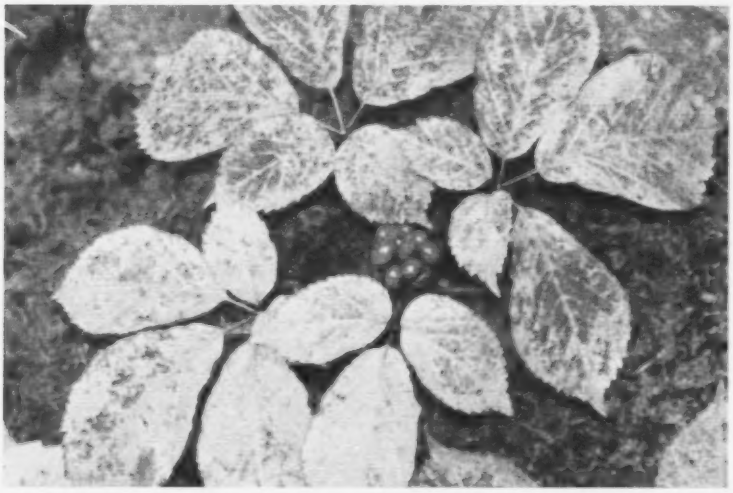
> How the ministry applies this flexibility will be a focal issue in assessing the effectiveness of government conservation measures for species at risk in the years to come.[45]

These concerns were well-founded. The recent regulatory amendments provide broad exemptions from the *ESA*'s prohibition on damaging or destroying habitat (many of them permanent), and eliminate ministry oversight of individual activities and the impact they may

have on species' habitat. These exemptions seriously undermine the effectiveness of not only the habitat protection prohibition, but the *ESA*'s very purpose.

Delaying the ESA's *Protections*

When the *ESA* came into force in 2008, it provided a five-year transition period before the general habitat protections would apply to endangered and threatened species that were not protected under the old law; these transition species would only start to receive general habitat protection as of June 30, 2013. In our 2009 special report, The Last Line of Defence, the ECO referred to this five-year gap in habitat protection as one of the "holes in this safety net for Ontario's species at risk."[46]



Now, the transition species whose habitat was intended to be protected under the *ESA* for the first time as of June 30, 2013 are subject to a broad exemption for a myriad of development and infrastructure projects that begin construction by June 30, 2015. This exemption effectively extends the transition period for habitat protection by an additional two years for many of the most significant and disruptive activities, which in most cases permanently alter or destroy habitat, including: residential, commercial and industrial development; roads and utilities; and advanced mining exploration and mine production. Further, for species that were newly listed on January 24, 2013, development and infrastructure projects that are approved before January 24, 2015, and that begin within five years of being approved, are exempt from the habitat prohibition for those species.

The amendments also delay the prohibition on the killing, harming, harassing, capturing or taking a member of a species for newly listed endangered and threatened species. Under the *ESA*, once a species is included on the SARO list – which must be done within three months of MNR receiving a report from COSSARO classifying or reclassifying the species – the subsection 9(1) prohibition on killing, harming, harassing, capturing or taking the species automatically applies. The new regulatory exemption for development and infrastructure projects creates a delay in the application of this prohibition of up to five years, provided certain conditions are met.

Proposed Changes to the *ESA* in Bill 55

In March 2012, the Ontario Government tabled Bill 55, the *Strong Action for Ontario Act (Budget Measures), 2012*. As originally presented, Bill 55 proposed several amendments to the *ESA* that were ultimately removed from the final version that passed into law in June 2012. The proposed amendments included:

- Broad exemptions from the prohibition against harming an endangered or threatened species or their habitat for a number of activities, including any work on existing infrastructure.
- Doubling timelines for preparing recovery strategies and government response statements.
- Removing the condition on certain exemption permits that the Minister be of the opinion that the activity at issue will not jeopardize the survival or recovery of the species in Ontario.
- Modifying the conditions that allow instruments issued under other acts to stand in place of an *ESA* permit under section 18, allowing for a much broader range of instruments to be substituted.

Although these proposed changes were not approved as part of Bill 55, they provided a noteworthy indication of the future that MNR envisioned for the *ESA*. There are many parallels between these proposed legislative changes, which were strongly criticized by stakeholders, and the amendments that were ultimately made to O. Reg. 242/08. Both focus on creating broader categories of exemption with fewer safeguards. As discussed in Section 3 of this Special Report, it appears that MNR may have used its limited discretionary powers to delay the delivery of recovery strategies and habitat regulations that it failed to postpone through the Bill 55 amendments.

SECTION 6

LACK OF OVERSIGHT AND BARRIERS TO ENFORCEMENT

The recent regulatory amendments under the *ESA* are part of MNR's Modernization of Approvals project under its Transformation Plan – in effect a devolution of natural resources management by the ministry (for more information, refer to Part 2.1 of the ECO's 2012/2013 Annual Report). Not only will MNR have less regulatory oversight of the activities covered by the new exemptions and a less comprehensive understanding of how the province's species at risk are being affected on the ground, but the ministry will also have far less contact with proponents of activities that no longer require an application-and-review type of approval.

6.1 Lack of Oversight of Activities Affecting Species at Risk

MNR Cannot Say 'No'

The *ESA* was designed with a number of flexibility tools, such as permits and agreements, which allow the ministry to authorize – usually on a case-by-case basis – activities that would otherwise be prohibited under the Act. These tools essentially provide a workable way to protect a greater number of species under the *ESA* than under the previous legislation, which protected the habitat of listed species without any exceptions.

Until the recent regulatory amendments were made, the Act required MNR to individually assess activities having an adverse effect on species at risk, and then decide whether a permit or agreement should be issued for a specific project. This provided the ministry with the ability to refuse a permit if warranted. For the activities covered by the new rules-in-regulation exemptions, there is no longer any evaluation or decision required by MNR. Put simply, if a proponent complies with the specifications set out in the regulation there is no possibility of a "no" by the government. The significance of this change cannot be overstated. The ECO warned in our 2009/2010 Annual Report:

> Tough choices need to be made to not allow an activity that would jeopardize a species or its habitat when warranted. The *ESA* must not be misused to facilitate a business-as-usual approach to the environment, simply another bureaucratic hurdle to be overcome by a proponent in a predetermined approvals process. The point of passing the *ESA* in 2007 was to move out of an era of neglect for our natural environment, and to take action to safeguard the most threatened aspects of Ontario's biodiversity.[47]

In effect, every place, no matter how unique or important, will be open to activities with the potential to adversely affect species at risk; no place is untouchable or special.

Applying generic rules to a broad range of activities throughout the entire province ignores the highly contextual nature of protecting species at risk. Protecting specific areas of habitat may be critical for protecting and recovering a given species, but now MNR will not have the ability to prevent projects in important areas. In effect, every place, no matter how unique or important, will be open to activities with the potential to adversely affect species at risk; no place is untouchable or special. Failing to individually assess projects also means that MNR will not have the ability to recognize, let alone prevent, unacceptable levels of cumulative impacts on species at risk. Viewed individually, projects may not be perceived as posing a substantial risk to a species; however, if multiple projects affect a particular species, or occur in close proximity to a sensitive area, they could collectively have catastrophic results, such as jeopardizing the survival of a species.

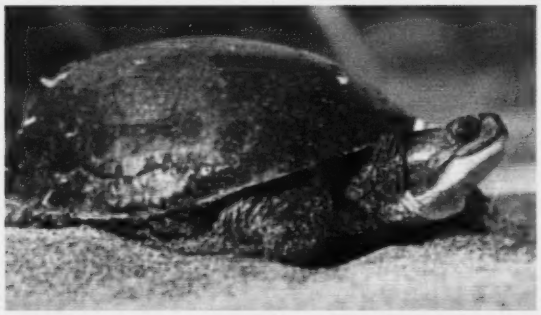
No Submission or Review of Mitigation Plans or Reports

The new exemptions generally do not require proponents to submit their mitigation plans to MNR for review or approval. Similarly, there are few circumstances under which proponents are required to submit mandatory records or reports to MNR. Although MNR may request this documentation, the ministry currently does not have an auditing protocol in place, and it is not clear under what circumstances MNR would make such a request.

Without a strong auditing protocol, MNR's new regulatory approach will be open to abuse because the ministry will not be able to ensure that proponents are maintaining a high standard of protection for affected species at risk. Although many proponents will retain qualified experts to provide advice on mitigation techniques and measures to minimize adverse effects, without even the most basic ministry scrutiny in place, substandard approaches will surely fall through the cracks.

The failure to review or even collect this information substantially hampers MNR's ability to learn about the successes or failures of its new regulatory approach. Without this information, it is practically impossible that MNR could undertake any meaningful effectiveness monitoring or program evaluation, or make appropriate improvements to this system over

Renewable Energy Approval Revoked because of Serious and Irreversible Harm to the Blanding's Turtle



In July 2013, Ontario's Environmental Review Tribunal granted an appeal of a renewable energy approval (REA) that had been issued to the Ostrander Point Wind Energy Park, a nine turbine wind energy facility on Crown land in Prince Edward County.[48] The Crown land on which the project was to be constructed is habitat for Blanding's turtle and whip-poor-will, both of which are threatened species in Ontario. The area also acts as a migratory corridor for other at-risk species such as birds, bats and the monarch butterfly; it also is part of an internationally recognized Important Bird Area (for further information on wind power and birds and bats see Section 3.2 of the ECO's 2011/2012 Annual Report, Part 2).

The Tribunal revoked the REA on the basis that roads for the project would cause "serious and irreversible harm" to the Blanding's turtle population at the project site due to increased mortality. Although the project had obtained an *ESA* permit from MNR requiring the proponent to provide an overall benefit to the Blanding's turtle in the province as a whole, the Tribunal found that the conditions were insufficient to protect the specific population affected by the project, in particular because the project would have been constructed directly in the species' habitat, and because the project was located on publicly accessible Crown land. In August 2013, appeals of the Tribunal's decision were filed with the Divisional Court.

This decision highlights that a high standard of protection is necessary under the *ESA* when MNR is contemplating the authorization of otherwise prohibited activities. Failing to do so not only creates the possibility of increased harm to species at risk, but also creates uncertainty for proponents who may face legal action. Specifically, the Tribunal's decision, if upheld, calls into question the adequacy of MNR's conception of "overall benefit" as applying at the provincial (as opposed to local population) scale, and casts doubt on whether the reduced level of protection afforded under the new rules in regulation would be sufficient to withstand legal scrutiny under similar circumstances. The Tribunal's decision also underscores the potential consequences of failing to consider site-specific factors when determining the adverse effects of projects on endangered and threatened species – a risk that is even greater under the new rules for exempted projects.

time. The failure to collect this valuable information also represents a lost opportunity for MNR to build on the existing body of knowledge on effective mitigation strategies for activities that adversely affect species at risk. Such shortcomings contradict the ministry's corporate direction to "promote the use of adaptive management and an ecosystem approach to manage risk and to continuously improve [its] resource management decisions."[49]

6.2 Barriers to Enforcement of the Act

No Compliance and Enforcement Strategy

A strong compliance and enforcement strategy is a critical element of a proponent-driven regulatory approach (i.e., based on self-assessment and self-regulation). However, it appears that MNR has moved ahead with the rules-in-regulation system for the *ESA* without first designing any appropriate compliance and enforcement policies to identify and address contraventions of the Act. This is a significant omission that further jeopardizes MNR's new regulatory approach and further weakens public confidence in the ministry's ability to protect species at risk.

Challenges to Prosecuting Contraventions of the Act

The *ESA* created several clear prohibitions on activities that adversely affect species at risk and their habitats (see Section 2 of this report). The permits and agreements that allow otherwise prohibited activities to occur also contain activity-specific conditions that are, for the most part, objectively verifiable.[50]

In contrast, the rules in regulation are complex and somewhat ambiguous. This will make it difficult to successfully prosecute contraventions of the *ESA* if and when they are identified by MNR. Enforcement officers, and potentially courts, may be put in the position of engaging in the highly subjective task of determining whether the various steps taken to minimize adverse effects are adequate, and in some cases, whether a proponent has properly determined that measures are "reasonable" or "feasible." The ECO is concerned that the regulatory amendments muddy the clarity of the Act and render the prohibitions functionally unenforceable.

SECTION 7

TRANSPARENCY AND PUBLIC CONSULTATION

Transparency is a key element of any successful regulatory framework, not only as a principle of open democratic governance, but as a tool to promote clarity and strengthen regulatory compliance through public scrutiny and civic engagement. Therefore, it is essential that the Ontario government ensure that the public is able to fully access information on how activities that affect species at risk are being regulated. The *Environmental Bill of Rights, 1993* (*EBR*) has a key transparency function; the *EBR* entrenches the rights of the public to receive notice of and provide input into environmentally significant acts, regulations and policies, such as the recent amendments to O. Reg. 242/08 and the development of policies to support MNR's new approach to implementing the *ESA*.

7.1 Limited Information Available to the Public

In June 2013, MNR launched a number of online tools that provide information on species at risk in Ontario. These include a species at risk "Permit Tracker"– an interactive map that provides information on *ESA* authorizations. As of September 2013, only a limited number of *ESA* permits were listed on the Permit Tracker; however, MNR states that eventually all permits, agreements and registrations (i.e., registered activities covered by a rules-in-regulation exemption) will be accessible through this tool.

The ECO supports MNR's recent commitment to provide more information to the public about permits and agreements and encourages MNR to ensure it provides up-to-date, accurate and complete information in this respect. Without access to this information, it is nearly impossible for citizens and community groups to determine what species are being affected by what activities throughout the province.

The Permit Tracker provides basic information such as the proponent, project, location, species and authorization type. However, the all-important mitigation plans that outline how proponents will minimize adverse effects on species at risk, as well as the reports on how the proponents are actually doing, will not be made publicly available. Denying the public access to mitigation plans and reports seriously impedes the public's ability to participate in and contribute to the protection and recovery of species at risk. Such public scrutiny could play an important role in ensuring that mitigation plans and reports are as thorough as possible. Ontario's species at risk would be better served by a culture of information sharing, dialogue and ongoing learning as the *ESA* is implemented over time.

7.2 Fewer Opportunities for Public Consultation and Failures to Comply with the *EBR*

ESA permits are posted on the Environmental Registry as either "information notices," or in some cases, as "instrument proposal notices," which allow for public comment before a decision is made (for further information refer to Part 1.3 of the ECO's 2012/2013 Annual Report).[51] Given that many activities that previously would have required a permit will now fall under a rules-in-regulation exemption, the *EBR* right to comment on these activities will be extinguished. Activities covered by the rules-in-regulation exemptions will no longer show up on the Environmental Registry as they are not prescribed instruments for the purposes of the *EBR*.

Although the public was able to provide input on the regulatory amendments that establish the rules for the new exemptions, MNR failed to provide an actual draft of the new regulation during the public comment period on the Environmental Registry. Instead, the ministry merely provided a description of the proposed regulatory amendments. Without an opportunity to review the draft regulation itself, it was extremely difficult for the public to provide meaningful comments on the regulation proposal.

There is a clear trend of MNR deliberately shielding its policies on species at risk from public input.

There is a clear trend of MNR deliberately shielding its policies on species at risk from public input. Under the *EBR*, MNR is legally required to post all environmentally significant policies on the Environmental Registry for public comment for a minimum of thirty days. However, MNR has persistently neglected its obligation to consult the public with respect to a number of environmentally significant policies pertaining to species at risk (see Part 3.3 of the ECO's 2009/2010 Annual Report).

For example, in June 2013, MNR created a Species at Risk Reference Toolbox, which is a collection of standards, guidelines, best management practices, and technical resources on Ontario's species at risk. The Toolbox contained three best management practices (BMP) documents for woodland caribou that the ministry had neglected to post on the Environmental

Registry for public consultation, as required under the *EBR*.[52] In response to the ECO's inquiry about the failure to consult on these environmentally significant policies, the ministry asserted that the BMPs provide "technical information" to "help operationalize approved policy direction." Although the ministry acknowledged that they had engaged a number of industry associations in the development of the BMPs, MNR decided that the public did not warrant being consulted.

In addition, in July 2013, MNR posted general habitat description policies for fourteen species at risk on its website, without first consulting the public through the Environmental Registry.[53] Although MNR characterizes these materials as "technical documents," these are in fact policies that essentially define the areas where the *ESA* prohibition on damaging or destroying habitat will apply, and define which activities the ministry considers to be compatible with the affected species' general habitats. In effect, MNR is formally defining the habitat of these 14 species through policy, and without consultation, rather than going through the proper procedure of regulating habitat through O. Reg. 242/08, which would also require consultation through the Environmental Registry. MNR's failure to post these policies on the Environmental Registry for public consultation constitutes a shocking disregard for its legal obligations under the *EBR* and the process set out under the *ESA*.

COMMISSIONER'S CONCLUSION

The Ontario legislature, with strong public support, passed the *Endangered Species Act, 2007*. It returned our province to the forefront of conservation, where we were more than 40 years ago when the first *Endangered Species Act* was passed in Ontario. The new law set out the will of the Members of Provincial Parliament with a straight-forward three-fold purpose: (1) identify species at risk; (2) protect species at risk and their habitats, and promote their recovery; and (3) promote stewardship activities to assist in their recovery. We should be justly proud of this accomplishment.

Making this law work lies squarely with the Ministry of Natural Resources. MNR is tasked with figuring out the critical problems facing species at risk, trying to make sure the problems don't get worse, and then diligently working toward improving the situation for the species. This statute does not set up inevitable conflicts with landowners or resource managers. The Act provides MNR with discretion as to how to apply the various provisions and prohibitions by issuing agreements, permits and exemptions. Implementing the law successfully, therefore, requires MNR to exercise this discretion diligently. This duty entails the ministry following three important principles: MNR's decisions should work towards the recovery of species; MNR must involve and engage the public; and MNR must take responsibility for and have the capacity to build and improve the species at risk framework. These principles can be achieved using a cooperative, progressive approach and do not have to involve coercion or unreasonable obstruction of economic activity. In fact, landowners with species at risk inhabiting their land may be, in many cases, the best source of practical knowledge about conservation.

But the fact is that the implementation of this legislation has failed miserably. The cause of that failure does not lie within the articles of the law. The fault lies entirely with the Ministry of Natural Resources. Since almost the very day that the Members of Provincial Parliament passed the *Endangered Species Act, 2007*, MNR has failed to do what is necessary to make the law work. The ministry has been stalling recovery strategies, crafting meaningless

government response statements, delaying habitat protection, mismanaging the permitting process and deliberately ignoring public participation. In the process they have infuriated property owners, industry groups and members of the general public, bringing the *ESA* into disrepute. As a result, the ministry has failed the Ontario legislature, the public, industry and – at the very heart of the matter – the imperiled species that are at risk of disappearing forever if nothing is done.

The regulatory amendments that were brought into force in July 2013 do not remedy this failure. By effectively exempting most of the major activities on the landscape that can adversely affect species at risk and their habitats, the regulation thwarts the very purposes of the Act. There is no opportunity to promote the recovery of species at risk. The requirement for proponents to draft, but not submit, mitigation plans to the ministry effectively locks MNR out of a critical information source. MNR will not learn if these plans and methodologies are sufficient to protect species at risk. They will not even know what the plans and methodologies are. The opportunity to build the knowledge and capacity to deal with the complex challenges facing species within MNR will be lost.

The focus of endangered and threatened species conservation should not be on interfering with landowners or industrial activities, nor should it be on broadly exempting those activities. It should be on improving conditions for the species. There are always issues, but in many cases accommodations can be made and problematic situations can be resolved.

However, sometimes, problematic situations are truly problematic for a species. Infrequently, it is necessary to stop some activity to save a species from being lost. The new law gave MNR the authority to say "no" in such cases. That is where the regulatory changes of 2013 have their most profound consequences: they do not allow MNR to say "no." Every place, no matter how unique or ecologically important, will be open to activities with the potential to adversely affect species at risk; no place is untouchable or special. And that does not appear to be consistent with the purposes of the Act or the general standards of modern natural resource management.

The *Endangered Species Act, 2007* is still a progressive and viable piece of legislation which envisages a future where the rich biodiversity of Ontario is protected and improved. The regulatory changes of July 2013 compromise that vision, but they can be reconsidered. The stresses on our flora and fauna in these challenging times are profound. We do not want Ontario's threatened and endangered species to disappear on our watch. We owe it to future generations to get beyond petty squabbles and find real solutions to the threats facing the province's species.

APPENDIX A SUMMARY OF IMPLEMENTATION MEASURES TO DATE

Listing and Classification of Species Since 2008

When the *ESA* came into force in 2008, the SARO list included 10 extirpated species, 80 endangered species, 48 threatened species and 46 species of special concern; 42 of these endangered species were carry-overs from the previous species protection statute. As of July 31, 2013, there were 15 extirpated species, 99 endangered species, 56 threatened species and 45 species of special concern. These changes reflect the addition of 32 previously unlisted species, as well as the re-categorization of 23 species or species populations into higher risk categories and 10 species or species populations into lower risk categories.

Recovery Strategies, Management Plans, Government Response Statements and Habitat Regulations

Recovery Strategies

The *ESA* requires MNR to ensure the preparation of a recovery strategy for each endangered and threatened species. Recovery strategies are required within one year of an endangered species being listed, and within two years of the listing of a threatened species. For those species already included on the SARO list when the *ESA* came into force (i.e., transition species), the statutory deadline for preparation of recovery strategies was June 30, 2013. The *ESA*, however, permits MNR to extend the statutory deadline for recovery strategies in certain circumstances, in which case MNR must post a notice on the Environmental Registry.

Completed: Recovery Strategies for 76 Endangered or Threatened Species

Of the 155 endangered or threatened species, as of July 31, 2013, 76 had a recovery strategy in place.[54] Most of these strategies were prepared within the applicable timeframe originally prescribed in the *ESA*, or with appropriate notices posted on the Environmental Registry to advise of and explain reasonable delays. In six cases, however, recovery strategies were delivered almost three months late, yet no notice of delay was posted on the Environmental Registry as required by the *ESA*.[55]

Delayed: Recovery Strategies for 72 Endangered or Threatened Species

As of July 31, 2013, 79 species do not have a recovery strategy in place.[56,57] Seven of these species were added to the SARO list in January 2013, and therefore do not require a recovery strategy until January 2014 (in the case of endangered species) or January 2015 (in the case of threatened species).[58] The recovery strategies for the remaining 72 species were all originally due on or before June 30, 2013; however, MNR gave notice that additional time was required in all cases.[59] For three species, MNR has set an expected draft release date of November

2013 for their recovery strategies. As detailed below, for the 69 other species or species populations, MNR has provided a relatively open-ended estimated timeframe for completion.

MNR has delayed preparation of recovery strategies for 35 species also listed under *SARA*, in order to allow coordination with the approaches set out in the federal recovery strategies.[60] For species waiting on federal strategies, MNR has provided a range of estimated deadlines: for some, it has estimated that it will prepare the provincial recovery strategies within nine months of receiving the federal document;[61] in other cases MNR has provided no estimated timeline and simply stated that once the federal strategy is available it will be finalized or adopted under the *ESA*.[62] In the most recent delay notice regarding 27 species, MNR stated that it expects to complete provincial recovery strategies, where a federal strategy is available, by May 31, 2016, but offered no comment on how many federal strategies it expects will be available by that date.[63]

MNR has delayed the recovery strategies for a further 35 species in order to prioritize the preparation of recovery strategies for other species; curiously, one of these species is among the three for which a November 2013 release date was provided. For the 34 other species, the Environmental Registry notice (#011-9048) states that MNR estimates these recovery strategies will nonetheless be completed within the next three years, which, in most cases, is eight years from the date the species was added to the SARO list. In other words, it will have taken approximately eight years just to get scientific advice on how to protect and recover these species, let alone have the Ontario government articulate what tangible steps it will take toward their conservation. On July 15, 2013, MNR released draft recovery strategies for seven of the species delayed for the purpose of prioritizing other species.[64]

Two further species had their recovery strategies delayed due to the complexity of the issues involved. The anticipated delivery date is now November 2013.[65]

Management Plans

The *ESA* requires that MNR produce species-specific management plans within five years of a species being added to the special concern list. There is an exception, however, for species that are also listed under *SARA* and for which the federal government must produce either a recovery strategy or management plan. Given this exception, there are currently only eight species for which MNR must develop management plans. Of these, six had been completed as of July 31, 2013.[66] The deadlines for the remaining two species are not until 2014 and 2018.

For the 34 special concern species also listed under *SARA* and therefore not requiring a provincial recovery strategy, federal recovery strategies or management plans have been developed for 11 (although not all had been finalized as of July 31, 2013). The remaining 23 species await federal management plans.

Government Response Statements

Fifty government response statements, which set out the steps Ontario intends to take to assist species recovery as mandated under the *ESA*, have been completed as of July 31, 2013.

The first government response statement, the Caribou Conservation Plan, was delivered half a year late, which the ECO stated was a "troubling precedent" for recovery planning.[67] Although all response statements delivered between 2010 and 2012 were on time, in 2013, MNR once again began missing deadlines and four response statements due by March 15, 2013 were delayed – without notice – until May 31, 2013.[68] Furthermore, two response statements have been outstanding for over a year.[69] Although MNR advised of an expected delivery date of June 2013, as of July 31, 2013 these response statements were still unavailable. Unlike delays of recovery strategies, the *ESA* does not provide for this type of extension. This issue is discussed in detail in Parts 4.3 and 4.4 of the ECO's 2012/2013 Annual Report. As of July 31, 2013, there were an additional 28 response statements due to be finalized by February 28, 2014.

Habitat Regulations and Descriptions

The *ESA* allows, and in some cases requires, MNR to develop species-specific regulations defining habitat areas. Where development of such regulations is mandatory, the proposed regulation must be posted for public comment on the Environmental Registry within two years of a species being listed as endangered or three years of a species being listed as threatened. Like recovery strategies and management plans, MNR may take longer to develop habitat regulations if necessary, but it must give notice and an explanation via a posting on the Environmental Registry.

In the fall of 2011, MNR missed its September deadline to propose habitat regulations for five species, yet did not post a delay notice on the Environmental Registry as required. The regulatory proposal (Environmental Registry # 011-5306) was eventually posted in December 2011. Deadlines for a further 31 species have been met with either a regulation proposal or a delay notice being posted on the Environmental Registry as required. It is apparent that the delays in preparing recovery strategies have had a spillover effect into the timeline for developing habitat regulations, as MNR appears to have adopted a practice of waiting for recovery strategies to be finalized before preparing habitat regulations.[70]

On July 2, 2013, MNR posted fourteen general habitat descriptions for various endangered and threatened species on its website. These documents are intended to provide "greater clarity on the area of habitat protected for a species based on the general habitat definition" and set out specific descriptions of different habitat types (e.g., overwintering, nesting, etc.), as well as categorization (which determines recommended activity setback distances). For further details refer to Section 7.2 of this Special Report.

Permitting and Agreements

As of June 30, 2013, MNR had issued approximately 560 permits and entered into 186 agreements since the introduction of the *ESA*.[71] While some agreements between MNR and private parties have been posted on the Environmental Registry as information notices, there is currently no complete public record of the total number of agreements, or the terms of agreements, provided publicly by MNR.

APPENDIX B

NEW EXEMPIONS UNDER O. REG. 242/08

This Appendix provides an overview of each of the new exemptions under O. Reg. 242/08. For information on the general conditions that apply to these exemptions see Section 4 of this Special Report. This summary is provided for information purposes only and should not be considered legal advice. Refer to O. Reg. 242/08 for full details pertaining to these exemptions.

Exemptions for Industrial and Development Activities

Exemptions for Specific Activities

Forestry

Permits will no longer be required for forest operations conducted before July 1, 2018, provided that the operation is on behalf of the Crown or authorized under a *Crown Forest Sustainability Act, 1994* licence. Forestry operations are now exempt from the prohibitions on killing, harming, harassing or taking a member of an endangered or threatened species, or damaging and destroying its habitat, provided that the proponent follows the appropriate operational prescription or condition for the affected species in the applicable forest management plan (FMP).[72]

However, if an FMP does not include a prescription or condition that applies to a particular species, and an operation encounters a habitat feature (e.g., a nest or den) of such a species, operations must be suspended until the FMP is amended to include an appropriate operational prescription or condition for that species.

The exemption also specifically includes woodland caribou (forest-dwelling boreal population) provided that additional conditions are met. For example, the FMP must provide for the continuous availability of caribou habitat (both spatially and temporally), the establishment and growth of areas of conifer forests that are suitable to provide future habitat, and road-use management strategies that assist in maintaining or improving habitat conditions.[73]

Hydro-electric Generating Stations

Operators of hydro-electric facilities were provided with an exemption when the *ESA* came into force if they entered into an agreement with MNR. As of June 2013, MNR had issued four agreements for waterpower activities. Operators with pre-existing waterpower agreements will have until July 1, 2018 to transition to the new rules-in-regulation exemption.

Examples of steps that must be taken to minimize adverse effects under the new exemption include: creating protective zones around nests, hibernacula, or other terrestrial features that the affected species uses to carry out its life processes; undertaking maintenance activities

at certain times and in a manner that minimizes the impact on species, or in a manner to benefit the species, if possible; and taking additional actions if mitigation techniques are not effective.[74] There is no requirement to provide an overall benefit to affected species.

The exemption does not apply to American eel at the R.H. Saunders Facility in Cornwall – a separate exemption for this facility exists provided that it maintains an agreement with MNR (for further information, refer to Part 3.3.2 of the ECO's 2009/2010 Annual Report). Also excluded from the exemption are activities that affect pygmy snaketail and Hungerford's crawling water beetle.

Aggregate Pits and Quarries

Pits and quarries that were in operation at the time the *ESA* came into force were subject to a transition exemption. This allowed proponents to conduct operations without a permit, provided that they entered into a species-specific agreement with MNR. As of June 2013, MNR had issued 93 agreements for aggregate activities.

These agreements will now expire on July 1, 2015 (or earlier if the proponent notifies MNR that it wishes to end its agreement), but pit and quarry operations will remain exempt from permit requirements if they register their activity and follow the rules in regulation. The new exemption is open to pits and quarries operating under a licence or permit issued under the *Aggregate Resources Act* (*ARA*), or located in an area of the province to which the *ARA* does not apply, but which operates in accordance with zoning by-laws.

This exemption covers species listed on or before January 24, 2013, but activities affecting the following species do not qualify for the exemption: blue racer; Butler's gartersnake; common five-lined skink (Carolinian population); Henslow's sparrow; small-mouthed salamander; Virginia mallow; and yellow-breasted chat. The proponent's eligibility depends on when their operation began or when an application for an *ARA* permit or licence was made.[75]

Examples of steps to minimize adverse effects include: ceasing operations to allow animals time to leave the area, and relocating them if they do not leave; excluding species from the area of activity; and creating protective zones around nests or hibernacula.[76]

Ditch and Drainage Activities

When the *ESA* came into force, a transition exemption existed for activities to maintain and repair certain drainage infrastructure provided that the proponent entered into an agreement with MNR. As of June 2013, MNR had issued 76 agreements for drainage activities. These agreements will now expire on July 1, 2015, and proponents will be required to comply with a new rules-in-regulation exemption.[77]

Examples of required steps to minimize adverse effects include: ceasing activity in order to provide animals with a reasonable amount of time to leave the area; excluding members of a species from the area where the activity will be carried out; and not reducing water levels in an area where turtles are likely to be hibernating.[78]

The exemption does not apply to the following ten species, unless the proponent entered into an agreement with MNR before June 30, 2010: bogbean buckmoth; cherry birch; false hop sedge; false rue anemone; grey fox; heart-leaved plantain; pugnose minnow; scarlet ammannia; small-mouthed salamander; and toothcup.

Early Exploration Mining

Certain early exploration mining activities affecting endangered or threatened species will no longer require a permit.[79] This exemption does not apply to golden eagle.

Examples of steps that must be taken to minimize adverse effects include: not carrying out the activity in an area used, or that has been used in the previous three years, to carry out a life process related to hibernation or reproduction; and establishing a protective zone around a moss, lichen or vascular plant, or relocating such species if necessary.[80] In addition, before the activity is complete, a proponent must restore damaged habitat to the extent possible, or create new habitat or enhance existing habitat for the species.

Wind Facilities

Wind facilities operating with a renewable energy approval (REA) issued under the *Environmental Protection Act* no longer require an *ESA* permit. Facilities that receive a REA after July 1, 2013 must submit their mitigation plan to MNR for approval.

Examples of steps that must be taken to minimize adverse effects on species include: taking steps to avoid killing, harming or harassing a member of a species by adjusting wind turbine blades, reducing the speed of blades, and periodically shutting turbines down when the risk is highest; and, if reasonable, creating or enhancing habitat elsewhere in the ecoregion.[81] If a proponent finds that the steps taken are not sufficient, then they are required to take further actions. This exemption does not apply to golden eagle.

Transition for Development and Infrastructure Projects

A broad transition exemption has been created for development and infrastructure projects that will affect newly listed species (i.e., species listed on January 24, 2013) and/or transition species with newly protected habitat (i.e., habitat protected under subsection 10(1)(a) of the *ESA* for the first time on June 30, 2013).[82]

This exemption covers many different types of activities, including: constructing drainage works;[83] residential, commercial and industrial development, including subdivisions;[84] carrying out projects subject to the *Environmental Assessment Act* or its regulations, including projects approved under a class environmental assessment,[85] as well as transit,[86] waste management and electricity projects;[87] construction of hydrocarbon lines and stations;[88] construction of renewable energy generation facilities;[89] certain solar facilities;[90] and certain mining activities such as advanced exploration, mine production, and rehabilitation of mine hazards.[91] This exemption also applies to proponents who damage or destroy the habitat of a transition species if an activity is otherwise authorized by an *ESA* permit issued before June 30, 2013.

While activities affecting both newly-listed and transition species are eligible for an exemption for damaging or destroying habitat, the exemption that allows for the killing, harming, harassing, capturing or taking a member of a species is only applicable to activities affecting newly listed species.

In order to qualify for the exemption, projects must reach a specified stage of the approvals process within two years of the date that the species was listed (for newly listed species) or, within two years of the habitat protection provision coming into effect (for transition species). For newly-listed species, projects must begin within five years of the date the approval requirements are completed (or by June 30, 2015, if approval requirements were satisfied prior to June 30, 2010). For transition species, construction must begin by June 30, 2015.

Examples of steps that are required to minimize adverse effects include avoiding work at times of the year and in areas where species are hibernating or reproducing, and excluding and relocating members of a species from the work area. In addition, proponents are required to take steps to restore habitat that is damaged or destroyed, if it is feasible, or create or enhance habitat.[92] Activities may not be carried out in an area being used, or that has been used in the past three years, by woodland caribou (forest-dwelling boreal population) to reproduce or rear young.

This exemption for development arguably imposes a lesser standard of protection than the government's current direction for land use planning found in the Provincial Policy Statement, 2005 (PPS) made under the *Planning Act*. The PPS directs that development and site alteration are not permitted in the significant habitat of endangered and threatened species. Additionally, development and site alteration are not permitted on adjacent lands unless the ecological function of the adjacent lands has been evaluated and it has been demonstrated that there will be no negative impacts on the natural features or on their ecological functions.

Human Health or Safety

A new exemption has been created for threats to human health or safety, where the threat is not imminent but is likely to have serious consequences in the short or long term if the activity is not carried out. Activities covered by this exemption include work undertaken to: prevent or remove pollution or contamination; prevent the spread of disease; and protect against drought, flooding, forest fires, unstable slopes and erosion. This exemption also covers a broad category of activities related to infrastructure, such as maintaining, repairing, removing, replacing or upgrading an existing structure or infrastructure. This includes the decommissioning of a mine, and work related to communications systems, electricity system, oil and gas pipelines, alternative and renewable energy systems, roads, railways, water works, wastewater works, stormwater works and some drainage works.

The exemption does not cover activities that involve changing the location of the structure or infrastructure, or an extension of the area occupied by the structure or infrastructure (except in the case of a culvert). In addition, the work cannot alter the way in which the structure or

infrastructure is used or operated. Eight species of vascular plants are excluded from the exemption: bird's foot violet; bluehearts; forked three-awned grass; heart-leaved plantain; juniper sedge; spotted wintergreen; Virginia goat's-rue; and Virginia mallow.

Examples of steps to minimize adverse effects include: avoiding activities during times of year when the species is hibernating or reproducing; excluding members of a species from an activity area; and relocating species to another suitable area.[93]

Whereas activity-specific exemptions (e.g., exemptions for hydro-electric generating facilities or wind turbines) require steps to minimize adverse effects that are targeted to the known impacts of those activities, it is highly unlikely that the potential adverse effects of the very broad range of activities covered by this provision can be fully mitigated by the generic steps recommended under this exemption.

Species-specific Exemptions

A number of the new exemptions apply to specific at-risk species, as described below. Contraventions of the *ESA*'s prohibitions related to these species are permitted, provided the rules in the regulations are followed – including, in almost all cases, registration with MNR. MNR explained that these species-specific exemptions were developed for species for which the most permits were sought under the previous approvals regime, and for which there was a standard set of conditions employed in permits (and that could be transferred to a regulation) to ensure that adverse effects to the species were minimized. Details of the species-specific exemptions are described below and summarized in Table 1, in Section 4 of this Special Report.

In addition to creating dedicated exemptions related to the specific species noted above, the amended regulation specifically excludes certain species from other exemptions. For example, seven endangered species are excluded from the new exemption for pits and quarries. Similarly, the regulation excludes eight species of vascular plants from the application of the new exemption for activities related to human health and safety.

Aquatic Species

A new exemption has been created for certain activities in or adjacent to a watercourse[94] affecting eleven mussel and eight fish species identified in a schedule to the regulation.[95] Eligible activities include: maintaining, repairing, modifying, expanding, removing or replacing a bridge, culvert, pier or other structure; and constructing, maintaining, repairing, modifying, expanding, removing or replacing a pipeline or conduit (provided that it is not installed using open-cut trench techniques). Activities that are related to dams and hydro-electric stations, increase the footprint of a structure by greater than 25 per cent, damage more than a given size of riparian area, or change the alignment of a watercourse are not eligible for this exemption, among other specifications.[96]

Examples of steps that are required to minimize adverse effects include: preventing members of a species from entering the work area and relocating fish and mussels to suitable habitat; not allowing vehicles or machinery in the water unless the area has been isolated; and redirecting the flow of a watercourse around the activity area in such a way that water quantity and quality is not affected downstream.[97]

In addition, within one year of completing the activity, the proponent must carry out an activity to provide a benefit to the affected species, such as: remediating an area of degraded riparian habitat; improving an existing storm water management facility; and remediating an existing perched culvert to remove barriers to fish passage.

Barn Swallow

The amended regulation creates new rules for altering a building or structure, such as a barn or a bridge, that constitutes habitat for barn swallow, a threatened species.[98] A person who wishes to harm or harass a barn swallow or damage or destroy its habitat by altering a building or structure is not required to obtain a permit under the *ESA* if that person complies with the conditions indicated in Table 1, and prepares and updates a "mitigation and restoration record."

To minimize adverse effects on barn swallow, a proponent must take certain measures, including:

- removing nests before the barn swallow's active season begins, and taking measures (such as installing tarps or nets) to prevent barn swallows from accessing any part of the building or structure during the activity;
- replacing any nests that were removed, damaged or destroyed with nest cups;
- creating new habitat, by either constructing a new building or modifying one or more existing structures, if the building or structure that provided habitat is destroyed or altered so that it no longer provides suitable habitat or provides a smaller nesting area; and
- maintaining new habitat for three years after creating it.

If the proponent is required to create new habitat, the amount of new habitat created must exceed the amount of habitat that was lost as a result of the proponent's activity.

Bobolink and Eastern Meadowlark

A proponent who, in the course of developing land in the habitat of bobolink or eastern meadowlark (both threatened species), damages or destroys less than 30 hectares of habitat and/or harms or harasses bobolink or eastern meadowlark, is now exempt from the requirement to obtain a permit under the *ESA*,[99] provided the proponent: follows the conditions indicated in Table 1; prepares and follows a habitat management plan; and avoids activities that are likely to harm bobolink or eastern meadowlark or damage or destroy their habitat between May 1 and July 31 in any year.

Proponents must also: create new habitat or enhance pre-existing habitat in accordance with the regulations, and manage the newly created or enhanced habitat; monitor and maintain records of the new or enhanced habitat for five years; and make a written commitment to continue to manage the new or enhanced habitat for 20 years, or until the damaged or destroyed habitat is returned to a suitable state for use by bobolink or eastern meadowlark. The amended regulation includes specific requirements for the location, size, soil and species composition, and management of created or enhanced habitat. In particular, the area of any new or enhanced habitat must exceed the area of habitat that is damaged or destroyed.

Butternut

The regulatory amendments exempt, in specified circumstances, the removal of butternut trees from the *ESA* prohibitions. The butternut is an endangered species whose primary threat in Ontario is a fungus known as "butternut canker." In order to qualify for the exemption, a property owner must first have the health of the butternut(s) in question evaluated by a qualified butternut health assessor, following which there is a 30-day waiting period during which MNR staff may visit the site.

After the 30-day waiting period, trees in the advanced stages of disease due to butternut canker (Category 1) may be removed without any further regulatory oversight. Up to 10 trees that do not have butternut canker or have a less advanced form of the disease (Category 2) may be removed without a permit, provided the proponent registers the activity with MNR and follows the rules in the regulation, including requirements to plant, care for and monitor butternut seedlings and to maintain records of the same. Trees that are assessed as potentially "useful in determining how to prevent or resist butternut canker" (Category 3) are not subject to the exemption and may not be removed without first obtaining a permit under the *ESA*.

Chimney Swift

A new exemption for chimney swift, a threatened species, allows a person to contravene the *ESA* prohibitions when carrying out the maintenance, repair, modification, replacement or demolition of a chimney that provides chimney swift habitat. In addition to the conditions outlined in Table 1, proponents must prepare and update a mitigation and restoration record.

To minimize adverse effects, the amended regulation requires certain measures be taken, including:

- preventing chimney swift from accessing the chimney that will be affected both before and during the active season (e.g., through measures such as capping the chimney);
- if a chimney is in use during the active season, suspending work that would affect that chimney until the end of the active season;
- if a chimney that provides habitat for chimney swift will be unavailable due to the activity during one active season only, improving the conditions for chimney swift nesting, resting or roosting (e.g., increasing the height of the chimney, installing a sun collar on the opening of the chimney, or cutting back vegetation encroaching on the chimney's opening);

- if a chimney that provides habitat for chimney swift will be destroyed, altered, provide less area for chimney swift nesting, resting or roosting, or rendered unavailable for more than one active season, creating new habitat for chimney swift in accordance with the regulation; and
- if new habitat is created, monitoring and keeping records of the use of the habitat by chimney swift for three to five years, in accordance with the regulations.

If a proponent is required to create new habitat, the new habitat must provide a greater amount of square footage available to chimney swift than did the chimney that was affected by the activity.

Ecosystem Protection and Activities to Benefit Species at Risk

Ecosystem Protection

A new rules-in-regulation exemption has been created for ecological conservation work that is aimed at benefitting native ecosystems.[100] Only certain types of organizations are eligible for this exemption, including: conservation authorities; municipalities; MNR; bands as defined under the *Indian Act*; post-secondary institutions; and incorporated non-profits and registered charities (or their trustees) with natural heritage, ecological conservation or similar objectives. Eligible organizations must obtain a written expert opinion stating that the activity is not likely to have an enduring adverse effect on the local population of the affected species.[101]

Examples of steps that must be taken to minimize adverse effects include: supervision of the activity by a person with expertise; training for individuals working on site; excluding and relocating (if necessary) individual members of endangered or threatened species; and avoiding the spread of disease among and between species.[102]

Species Protection and Recovery Activities

Certain activities that are intended to assist in the protection or recovery of endangered or threatened species will no longer require a permit or stewardship agreement under section 16 of the *ESA*. Such activities include actions under a provincial recovery strategy or government response statement, as well as actions under a federal *SARA* recovery strategy or management plan. Other activities may be eligible, including: enhancing, maintaining or restoring habitat; reducing a threat identified in a federal status report; or developing scientific knowledge related to the species or its habitat. However, the killing of a member of an endangered or threatened species cannot be an intentional part the activity. The ECO supports this move towards expediting activities that are intended to benefit species at risk.

Safe Harbour Habitat

Safe harbour habitat is habitat that is created or enhanced in order to provide habitat to a species for a certain period of time. Now, individuals who create (or, in the case of bobolink and eastern meadowlark, enhance) safe harbour habitat under an *ESA* permit or stewardship

agreement will qualify for an exemption that allows damage to or destruction of the habitat after a specified period of time without the need for a permit, provided that all the requirements of the safe harbour instrument have been met.[103] If a person qualifies for this exemption, they are also exempt from the prohibition on killing, harming, harassing, capturing or taking a member of a species.

Examples of steps to minimize adverse effects of the activity include: avoiding activities at certain times of year and in areas where a species is carrying out life process (such as reproduction or hibernation); excluding species from the activity area; and relocating members of a species.[104]

In the Supplement to our 2011/2012 Annual Report, the ECO noted that the development of safe harbour agreements in Ontario could be beneficial where private landowners are key providers of the habitat for a particular species at risk.[105] Given that eligibility is limited to activities covered by *ESA* permits or stewardship agreements with MNR oversight, and that with the exception of bobolink and eastern meadowlark, the exemption requires the creation of new habitat, the rules-in-regulation approach to activities that adversely affect safe harbour habitat appears to be reasonable. However, the ECO strongly urges MNR to work with landowners to encourage the long-term protection of habitat created under safe harbour instruments.

Administrative Efficiencies

The amended regulation includes a series of administrative changes that transition pre-existing exemptions and activities previously covered by permit into the rules-in-regulation system. These include: possession and transport of species at risk for educational and scientific purposes; incidental catch of species at risk; and the commercial cultivation of vascular plants. These relatively low risk activities appear to be appropriate uses of the permit-by-rule system.

ENDNOTES

[1] Rashid Hassan, Robert Scholes and Neville Ash, eds., *Ecosystems and Human Well-being: Current State and Trends, Volume 1 – Findings of the Condition and Trends Working Group of the Millennium Ecosystem Assessment* (Washington: Island Press, 2005), 96.

[2] The International Union for Conservation of Nature estimates that 22 per cent of mammals, 32.4 per cent of amphibians and 13.6 per cent of birds are globally threatened or extinct. Jean-Christophe Vié, Craig Hilton-Taylor and Simon N. Stuart, eds., *Wildlife in a Changing World – An Analysis of the 2008 IUCN Red List of Threatened Species* (Gland, Switzerland: IUCN, 2009), 18–28.

[3] For example, Ontario's Natural Heritage Information Centre categorizes over 1100 species as imperiled, critically imperiled, and possibly/presumed extirpated.

[4] The peregrine falcon was downlisted from endangered to threatened, and the bald eagle was downlisted to special concern in certain regions of the province. See Environmental Registry #RB105E6803.

[5] Environmental Commissioner of Ontario, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (Toronto: 2009), 38.

[6] Environmental Registry #011-7696.

[7] Species may be classified as extinct, extirpated, endangered, threatened or special concern. *Endangered Species Act, 2007*, S.O. 2007, c. 6 [*ESA*], s. 5.

[8] Provincial management plans are not required if a recovery strategy or management plan for that species is required under the federal *Species at Risk Act*, S.C. 2002, c. 29 [*SARA*]. *ESA*, s. 12(2).

[9] There is no obligation for MNR to prepare a government response statement for species of special concern for which a federal recovery strategy or management plan is required. *ESA*, s. 11(8), s. 12(5).

[10] For further detail refer to Sections 7 and 8 of the Last Line of Defence.

[11] For further detail refer to s. 57 of the *ESA*.

[12] A delay for such purposes is permitted under s. 11(5)(a) of the *ESA*.

[13] Although *SARA* requires recovery strategies to be proposed within one year of the species being listed as endangered, and within two years of the species being listed as threatened or extirpated, these timelines are sometimes broken and have little bearing on when a recovery strategy will actually be completed. Several federal recovery strategies have been indefinitely delayed. For example, in the case of the loggerhead shrike, which is listed as endangered both provincially and federally, a draft federal recovery strategy has been publically available since November, 2010, but finalization has been delayed for unknown reasons since that time. There is no public federal timetable for the preparation and finalization of all outstanding recovery strategies. The average number of federal recovery strategies for species at risk in Ontario prepared annually between 2006 and 2012 is 5.71.

[14] These species are fawnsfoot, hickorynut and black redhorse.

[15] Environmental Registry #011-9048.

[16] These species are cerulean warbler (listed as threatened under the *ESA* and special concern under *SARA*), for which a federal management plan was completed in April, 2012, and showy goldenrod (Great Lakes Plains population), for which the federal recovery strategy was completed in March 2011.

[17] A delay for such purposes is permitted under s. 11(5)(a) of the *ESA*.

[18] These species are American eel and wolverine, for which MNR has announced an expected recovery strategy release date of November 2013; see Environmental Registry #011-9048. Showy goldenrod (boreal population), despite being on the secondary priority list, has also been provided with a November 2013 recovery strategy release date.

[19] Specifically, the ECO's 2010/2011 Annual Report stated: "The ECO recommends that MNR ensure that government response statements clearly articulate the actions that the Ontario government will and will not take to protect and recover species at risk." Environmental Commissioner of Ontario, *Engaging Solutions: Annual Report, 2010/2011* (Toronto: 2011), 34–38.

[20] Similar circumstances to those discussed with respect to federal recovery strategies in note 13 also exist in the case of management plans. The average rate of production between 2009 and 2012 was 1.75 management plans per year for Ontario special concern species.

[21] Environmental Registry #011-7696 (regulation decision notice).

[22] Deloitte, *Review of Permitting Costs and Timelines – Ministry of Natural Resources* (October 2011), 1.

[23] However, activities that fall under the aquatic species exemption do not qualify for this exemption. O. Reg. 242/08, s. 23.13(4).

[24] For the purposes of this column, steps are categorized as an action to benefit the species where the rules require a proponent to improve conditions (e.g., create or enhance habitat that did not previously exist, or more than previously existed). Steps that would result in neutral or diminished conditions for the species (e.g., requirements to repair habitat to the extent possible, or create habitat that merely replaces the same amount of destroyed habitat) are not included in this category.

[29] If the animal killed is a furbearing mammal, a person must obtain a licence to possess a pelt under the *Fish and Wildlife Conservation Act, 1997*. If the animal is not a furbearing mammal, the person must register their activity through a notice of incidental trapping form. O. Reg. 242/08, s. 23.19(1).

[30] Although this exemption does not specifically require proponents to "minimize adverse effects," in order to qualify proponents must cultivate plants: (1) without using any material taken from the wild in Ontario after the species was listed; (2) without cultivating the species in the wild; and (3) in a manner that is not likely to spread disease or pests to, or to compromise the genetic integrity of, wild populations of the species. O. Reg. 242/08, s. 12(1).

[31] Proponents must prepare a mitigation and restoration record. O. Reg. 242/08, s. 23.5(3)(1)(iii).

[32] Monitoring and reporting obligations only apply if actions to benefit the species are required. O. Reg. 242/08, s.23.5(10).

[33] If existing habitat will be destroyed or altered so as to be rendered reduced or unusable for more than one nesting season, proponents are required to create new habitat in an amount greater than that lost. O. Reg. 242/08, s. 23.5(9).

[34] Proponents must prepare a habitat management plan. O. Reg. 242/08, s. 23.6(4)(1)(ii).

[35] Such actions are only required for the removal of category 2 trees. O. Reg. 242/08, s.23.7.

[36] Proponents must prepare a mitigation and restoration record. O. Reg. 242/08, s. 23.8(3)(1)(iii).

[37] Monitoring and reporting obligations only apply if actions to benefit the species are required. O. Reg. 242/08, s.23.8(8).

[38] If existing habitat will be destroyed or altered so as to be rendered permanently reduced or unusable, proponents are required to create new habitat in an amount greater than that lost. O. Reg. 242/08, s. 23.8(6).

[39] Does not apply if the activity is the replacement of a closed-bottom culvert or a clear span bridge O.Reg.242/08, s.23.4 (12).

[40] A report must be submitted to the Natural Heritage Information Centre within 180 days of completing the activity. O. Reg. 242/08, s. 23.17(6)(9).

[41] Mitigation plans are only required if the activity results in the upgrading or removal of a structure or infrastructure, the decommissioning of a mine or the replacement of an entire structure or infrastructure. O. Reg. 242/08, 23.18(5)(1)(ii).

[42] If the proponent is conducting their operation under a sustainable forest licence, they must submit an annual report for each forest management unit that falls within the continuous distribution area of the woodland caribou. O. Reg. 242/08, s. 22.1(3)(3).

[43] If the activity affects woodland caribou (forest-dwelling boreal population), the proponent must submit its report to the ministry. O. Reg. 242/08, s. 23.10(4).

[44] For renewable energy approvals issued after July 1, 2013, mitigation plans must be submitted to and approved by MNR. O. Reg. 242/08, s. 23.20 (6)–(8).

[45] Reporting obligations are situation specific and vary as the project continues. See O. Reg. 242/08, s.23.20(13)–(14) for more information.

[46] Environmental Commissioner of Ontario, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (Toronto: 2009), 34.

[47] Ministry of Natural Resources, *Endangered Species Act Submission Standards for Activity Review and 17(2)(c) Overall Benefit Permits* (February 2012).

[48] Environmental Commissioner of Ontario, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (Toronto: 2009), 35.

[49] Environmental Commissioner of Ontario, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (Toronto: 2009), 31.

[50] Environmental Commissioner of Ontario, *The Last Line of Defence: A Review of Ontario's New Protections for Species at Risk* (Toronto: 2009), 2.

[51] Environment Commissioner of Ontario, *Redefining Conservation – Annual Report 2009/2010* (Toronto: 2010), 51.

[52] *Alliance to Protect Prince Edward County v. Director, Ministry of the Environment*, ERT No. 13-002/13-003 (July 3, 2013).

[53] Ministry of Natural Resources, *Our Sustainable Future: A Renewed Call to Action, Ministry of Natural Resources Strategic Directions*. (Ontario: Queen's Printer for Ontario, 2011), 6.

[54] See, for example, a recent overall benefit permit with respect to Butler's gartersnake, issued for the construction of a mixed residential and commercial development (Environmental Registry #011-7822). The steps to minimize adverse effects included a requirement to conduct targeted salvage of Butler's gartersnake individuals from the North parcel of the development site and move them to the adjacent Central and South parcels outside the

development site, as Butler's gartersnake individuals are known to move between the habitat in the North, Central and South parcels. The actions to achieve an overall benefit included a requirement to construct key habitat features for Butler's gartersnake including two live-birthing sites and thermoregulation sites within restored and enhanced sites. Given the specificity of these tasks, it would be relatively simple to confirm whether or not they were completed by the proponent.

[51] Significant differences exist between regular "proposal notices" and "information notices." With regular proposal notices, a ministry is required to invite and consider public comments, and post a decision notice explaining the effect of comments on the ministry's decision. The ECO then reviews the extent to which the ministry considered those comments and its Statement of Environmental Values when it made the final decision. Information notices do not usually include the right to comment and are not followed by a decision notice that clearly indicates what was finally decided.

[52] MNR failed to post the following environmentally significant policies on the Environmental Registry for public consultation: Best Management Practices for Tourism Activities and Woodland Caribou in Ontario; Best Management Practices for Renewable Energy, Energy Infrastructure and Energy Transmission Activities and Woodland Caribou in Ontario; and Best Management Practices for Mineral Exploration and Development Activities and Woodland Caribou in Ontario.

[53] The species for which MNR posted general habitat description policies include: American ginseng; barn swallow; Blanding's turtle; bobolink; chimney swift; eastern meadowlark; eastern whip-poor-will; Henslow's sparrow; loggerhead shrike; massasauga; piping plover; red mulberry; silver shiner; and woodland caribou.

[54] As of July 31, 2013, there were a total of 75 completed recovery strategies. However, it should be noted that this total includes the recovery strategy for peregrine falcon, which was finalized before the species' status was changed from threatened to special concern. This total also includes two recovery strategies that each cover two separately listed populations on the SARO list – grey ratsnake (the Carolinian population is listed as endangered and the Frontenac Axis population is listed as threatened) and eastern foxsnake (the Carolinian population is listed as endangered and the Georgian Bay population is listed as threatened).

[55] The delayed recovery strategies were those for bogbean buckmoth, four-leaved milkweed, Laura's clubtail, rusty-patched bumble bee, polar bear, and lake sturgeon (Great Lakes-Upper St. Lawrence population and Northwestern Ontario population, which are listed separately on the SARO list), which were all completed on December 7, 2011, as noted in Environmental Registry #011-5243.

[56] It is expected that both populations of showy goldenrod (one listed as threatened, one listed as endangered) will share one recovery strategy. Therefore, 78 recovery strategies will deal with 79 entries on the SARO list.

[57] This number includes seven species for which draft strategies were posted on the Environmental Registry (#011-9442) on July 15, 2013.

[58] Environmental Registry #011-7632 and #011-5098.

[59] Environmental Registry #011-9048, #010-8464, #010-9937, #011-7891, #011-6390, and #011-3465.

[60] *SARA* also requires production of recovery strategies under s. 37.

[61] Environmental Registry #010-8464, #010-9937 and #011-3465.

[62] Environmental Registry #011-7891 and #011-6390.

[63] Environmental Registry #011-9048.

[64] Environmental Registry #011-9442.

[65] EEnvironmental Registry #011-9048

[66] These six management plans were not posted on the Environmental Registry, but directly on the MNR website on June 28, 2013.

[67] Environmental Commissioner of Ontario, *Redefining Conservation - Annual Report Supplement 2009/2010* (Toronto: 2010), 182.

[68] Environmental Registry #011-6528.

[69] The affected species are polar bear and two populations of lake sturgeon (Great Lakes-Upper St. Lawrence River population and northwestern Ontario population); see Environmental Registry #011-5243.

[70] This explanation is provided in a number of notices of additional time required; Environmental Registry #011-2472; #011-5326; #011-9069, #011-5626 and #011-7001.

[71] The breakdown of permits, as provided by MNR, as of June 30, 2013, is as follows:

Health or Safety: 17
Protection or Recovery: 446 (this number is not complete)
Overall Benefit: 96
Significant Social or Economic Benefit to Ontario: 2

The breakdown of agreements, as provided by MNR, as of June, 2013, is as follows:

Aggregates: 93
Drainage: 76
Infrastructure/Development: 12
Waterpower: 4
Stewardship: 1

[72] Note that if the FMP includes an operational prescription for an area of concern, that prescription must be followed. If the FMP does not include an operational prescription for an area of concern, but includes a condition on regular operations that specifically applies to the species, that condition must be followed. O. Reg. 242/08, s. 22.1(2).

[73] In addition, if the proponent is the holder of a sustainable forest licence, management unit reporting on forestry activities must be provided as required under the Forest Management Planning Manual. O. Reg. 242/08, s. 22.1(3)3; MNR, *Forest Operations and Endangered or Threatened Species* (June 2013).

[74] For a full list of required steps see O. Reg. 242/08, s. 23.12(5).

[75] If a species was listed prior to January 24, 2013, then the pit or quarry must have been in operation either before the species was listed, or before the species first appeared on site. If a species was listed on January 24, 2013, then the pit or quarry must have been in operation before the species was listed or before the species first appeared on site, or an application for a permit or licence must have been made before the listing – and the applicant must have received notice from MNR that the application complies with the requirements of the *ARA*. O. Reg. 242/08, 23.14(3).

[76] For a full list of required steps see O. Reg. 242/08, s. 23.14(9).

[77] Note that eligible activities include: improving or maintaining drainage works, if an agreement for the activity was filed under s. 2(2) of the *Drainage Act*; improving, maintaining or repairing drainage works, if a report that applies to the works was adopted under either s. 45(1) or s.3(15) (as that subsection read on October 24, 2010) of the *Drainage Act*; and maintaining a ditch construction under *The Ditches and Watercourses Act*, in accordance with s. 3(18). O. Reg. 242/08, s. 23.9(1).

[78] For a full list of required steps see O. Reg. 242/08, s. 23.9(13).

[79] Under s. 23.10(1) of O. Reg. 242/08, eligible activities include those constituting early exploration as defined in s. 1(1) of O. Reg. 308/12 (Exploration Plans and Exploration Permits) made under the *Mining Act*, if the activity:

- is listed in Schedule 2 of O. Reg. 308/12 and is included in an exploration plan that was submitted to the Director under s. 5 of that regulation;
- is listed in Schedule 3 of O. Reg. 308/12 and is authorized by a permit issued under s. 78.3 of the *Mining Act*; or,
- is authorized by a permit issued under s. 78.3 of the *Mining Act* that was required by a Director under s. 18 of O. Reg. 308/12.

[80] For a full list of required steps see O. Reg. 242/08, s. 23.10(10).

[81] For a full list of required steps see O. Reg. 242/08, s. 23.20(11).

[82] Activities that fall under the aquatic species exemption do not qualify for this exemption. O. Reg. 242/08, s. 23.13(4).

[83] Applies to drainage works under an agreement filed under s. 2(2) of the *Drainage Act*, and those in respect of which an engineer's report was adopted under s. 45(1) of the *Drainage Act*. O. Reg. 242/08, s.23.13(2)(1) and s. 23.13(2)(2).

[84] Ministry of Natural Resources, *Development/Infrastructure Projects and Newly Protected Species or Habitats* (June 2013). Applies to activities such as:

- laying down highways and lots within a plan of subdivision under s. 51(57) of the *Planning Act*, and developing land within a plan of subdivision approved under the *Planning Act* (O. Reg. 242/08, s. 23.13(2)(3) and s. 23.13(2)(4));
- development in an area designated as a site plan control area under s. 41(2) of the *Planning Act* (O. Reg. 242/08, s. 23.13(2)(5));
- development authorized under a development permit issued under O. Reg. 608/06 under the *Planning Act* (O. Reg. 242/08, s. 23.13(2)(6)); and
- development of a unit within the meaning of the *Condominium Act, 1998* (O. Reg. 242/08, s. 23.13(2)(7)).

[85] O. Reg. 242/08, s. 23.13(2)(8) and s. 23.13(2)(9). However this exemption does not apply to the operation of a hydro-electric generating station or a wind facility within the meaning of O. Reg. 359/09. O. Reg. 242/08, s. 23.13(3).

[86] Applies to transit projects as defined in s. 1(1) of O. Reg. 231/08 under the *Environmental Assessment Act*, in respect of which the Minister has given a notice to proceed with the project. O. Reg. 242/08, s. 23.13(2)(10).

[87] Applies to electricity projects designated as an undertaking to which the *Environmental Assessment Act* applies under O. Reg. 116/01 (Electricity Projects) (O. Reg. 242/08, s. 23.13(2)(11)). However this exemption does not apply to the operation of a hydro-electric generating station or a wind facility within the meaning of O. Reg. 359/09. (O. Reg. 242/08, s. 23.13(3)). The exemption also applies to waste management projects designated as an undertaking to which the *Environmental Assessment Act* applies under O. Reg. 101/07 (O. Reg. 242/08, s. 23.13(2)(12)).

[88] Applies to the construction of hydrocarbon lines or stations under the authority of an order made under Part VI of the *Ontario Energy Board Act, 1998*. O. Reg. 242/08, s. 23.13(2)(13).

[89] Applies to facilities under the authority of a renewable energy approval issued under the *Environmental Protection Act*. O. Reg. 242/08, s. 23.13(2)(14).

[90] Applies to an activity described in s. 3 of O. Reg. 350/12 (Registrations under Part II.2 of the Act – Solar Facilities) under the *Environmental Protection Act*. O. Reg. 242/08, s. 23.13(2)(15).

[91] These exemptions apply to: advanced exploration carried out under Part VII of the *Mining Act*, mine production carried out under Part VII of the *Mining Act*, rehabilitation of a mine hazard in compliance with a certified closure plan pursuant to an order made under s. 147(1) of the *Mining Act*, and voluntary rehabilitation of a mine hazard approved under s. 139.2 of the *Mining Act*. O. Reg. 242/08, s. 23.13(2)(16)–(19).

[92] For a full list of required steps see O. Reg. 242/08, s. 23.13(8).

[93] For a full list of required steps see O. Reg. 242/08, s. 23.18(5)(6).

[94] Certain waterbodies are excluded, including the Detroit River, the Niagara River, the St. Clair River, the St. Lawrence River, a portion of the Syndenham River and a portion of the Ausable River. See O. Reg. 242/08, s. 23.4(3).

[95] Eligible species are listed in O. Reg. 242/08, s. 23.4, Schedule. Mussel species include: eastern pondmussel; fawnsfoot; hickorynut; kidneyshell; rayed bean; round pigtoe; salamander mussel; snuffbox; mapleleaf mussel; rainbow mussel; and wavy rayed lampmussel. Fish species include: eastern sand darter; pugnose shiner; redside dace; black redhorse; channel darter; cutlip minnow; silver shiner; and spotted gar.

[96] For a full list of excluded activities see O. Reg. 242/08, s. 23.4(2).

[97] For a full list of required steps see O. Reg. 242/08, s. 23.4(9).

[98] The barn swallow exemption only applies to contraventions resulting from altering buildings or structures; a permit may still be required for activities that would damage or destroy other barn swallow habitat.

[99] This new exemption only applies to land development such as the construction of buildings, structures, roads or other infrastructure and the excavation and landscaping of land. It does not apply to land development approved under provincial planning laws such as the *Planning Act* or the *Condominium Act, 1998*, for which other exemptions apply. O. Reg. 242/08, s. 23.6(1), s. 23.2.

[100] The exemption applies to activities to protect, maintain, enhance or restore an ecosystem native to Ontario. However, the following types of community classes under the land classification system for southern Ontario are excluded: a fen; a bog; a sand barren or dune; a beach bar; an alvar; a cliff; and a talus. Ecosystems with the defining characteristics of these community classes that are outside of the area covered by the land classification system for southern Ontario are also ineligible. O. Reg. 242/08, s. 23.11(1), s. 23.11(2).

[101] In particular, the opinion must state that the activity will not result in an overall decrease in the local population of the species over the next three generations, or the following ten years [whichever is earlier]; and that the activity will not result in conditions that will prevent movement between local populations, or movement through foraging, dispersal and migration areas. O. Reg. 242/08, s. 23.11(10)(3).

[102] For a full list of steps that must be taken see O. Reg. 242/08, s. 23.11(12).

[103] O. Reg. 242/08, s. 23.16(2), s. 23.16(4). For further details on the requirements for safe harbour instruments see s. 23.16(1) and 23.16(3).

[104] For a full list of steps that must be taken see O. Reg. 242/08, s. 23.16(6).

[105] Environmental Commissioner of Ontario, *Losing Our Touch: Annual Report 2011/2012 Supplement* [Toronto, Ontario: 2012], 98.

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